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Roy S. Ludlow Investment Company v. Thomas W. Ostler, Neil W. Ostler, Lee H. Ostler, Paul F. Ostler, John A. Vandermyde, Delbert Christensen, individually and all doing business as Design Label Manufacturing : Brief of Appellee

Utah Court of Appeals

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John Burton Anderson; Kenneth M. Hisatake; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

ROY S. LUDLOW INVESTMENT COMPANY, Plaintiff and Appellant, vs. THOMAS W. OSTLER, NEIL W. OSTLER, LEE H. OSTLER, PAUL F. OSTLER, JOHN A. VANDERMYDE, DELBERT CHRISTENSEN, individually and all doing business as DESIGN LABEL MANUFACTURING, Defendants and Appellees.	Case No. 920174 CA Priority No. 16

BRIEF OF THE APPELLEES LEE H. OSTLER, PAUL F. OSTLER, DELBERT CHRISTENSEN, INDIVIDUALLY AND DOING BUSINESS AS CUSTOM DESIGN LABEL MANUFACTURING

Appeal from the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Frank G. Noel, Judge

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INTRODUCTION

Appellant is the plaintiff/landlord. Appellees are the defendant/tenants.

JURISDICTION

The Court of Appeals has jurisdiction of the appeal, pursuant to Section 78-2a-3(2)(j), Utah Code Annotated, 1953, as amended.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. The Trial Court correctly ruled that the lease agreement was ambiguous as to the term of the lease and, thus, the admission of parol testimony to explain the ambiguity was proper. The standard of review is for correctness of the Trial Court's ruling on a question of law. Plateau Mining Co. v. Utah Division of State Lands, 802 P.2d 720, (Utah, 1990).

The question of the intent of the parties is a question of fact to be determined by the trier of the facts and plaintiff must show that the Trial Court's ruling was clearly erroneous. Jarman v. Reagan Outdoor Advertising Co., 794 P.2d 492, (Utah Ct. Appls., 1990).

2. The Trial Court did not err in granting attorneys' fees pursuant to Section 78-27-56.5, Utah Code Annotated, 1953, as amended. The standard of review is for correctness of the Trial Court's ruling on a question of law. Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, (Utah Ct. Appls., 1987).

3. The defendants should be awarded attorneys' fees on this appeal. Section 78-27-56.5, Utah Code Annotated, 1953, as amended.

4. Plaintiff should be assessed treble costs pursuant to Rule 33, Utah Rules of Appellate Procedure, and Rule 11, Utah Rules Of Civil Procedure, for filing a frivolous appeal. Eames v. Eames, 735 P.2d 395, (Utah Ct. Appls., 1987), Hunt v. Hurst, 785 P.2d 414, (Utah, 1990).

DETERMINATIVE STATUTES AND RULES

Section 78-2a-3(2)(j), Utah Code Annotated, 1953, as amended

Section 78-27-56.5, Utah Code Annotated, 1953, as amended

Rule 11, Utah Rules Of Civil Procedure

Rule 33, Utah Rules of Appellate Procedure

STATEMENT OF THE CASE

Plaintiff initiated an action for breach of a lease agreement. The lease agreement, a standard printed lease form, was originally prepared by the landlord for three (3) years lease term. However, before the lease agreement was signed, and at the defendant/tenants' request, the plaintiff/landlord inserted typewritten verbiage that read:

> "At the end of each year,the tenant and landlord will jointly review the contract for renewal." (R-72, para. 9)

Shortly after the lease was entered into between the defendants and the original landlord, McMullin and Company, McMullin assigned its interest to the lease and sold its interest in the property to the plaintiff, Roy S. Ludlow Investment Company.

At the expiration of the first year of the lease, the defendants met with Roy S. Ludlow and requested a meeting to "review the lease for renewal." (T-79, lns. 1-6) Mr. Ludlow

refused to negotiate or review the lease with the defendants. (T-79, lns. 12-14, T-42, lns. 3-5.) Defendants subsequently gave notice that they intended to terminate the lease at the end of the year and vacated the premises. (T-42, lns. 13-16).

Plaintiff initiated this action after the defendants vacated the premises.

Plaintiff contended that the lease was for three (3) years and that defendants breached the lease agreement when they vacated the premises after the first year.

Defendants contended the lease term of three (3) years had been modified by inserted typewritten words and the parties were obligated to jointly review the lease at the expiration of each year to renew the lease but plaintiff failed and refused to meet with defendants to review the lease for renewal. Defendants contended that the lease was for a maximum duration of three (3) years, to be reviewed and renewed each year.

Nature Of the Case.

The case involves the construction of a lease agreement and, particularly, the provisions relating to the duration of the lease. The lease agreement contained provisions which specified three (3) years or the duration of the lease with increasing lease payments each year. However, typewritten verbiage was inserted by the original landlord at the request of the tenants, prior to the execution of the agreement, which provided that the parties would review the lease annually for renewal.

After the lease was assigned to the plaintiff, and at the

expiration of the first year, the defendants/tenants requested the joint review for renewal. The plaintiff/landlord refused to meet with defendants. Defendants vacated the premises. Plaintiff, thereupon, initiated this action.

Defendants defended on the basis that the inserted typewritten verbiage obligated the parties to jointly review the agreement for renewal; that the plaintiff refused to review the lease for renewal; and, therefore, the plaintiff was in breach of the agreement and defendants were excused from further performance on the lease.

Course of the Proceedings.

Plaintiff contended throughout the proceedings that the lease was clear and unambiguous and parol testimony should not be permitted to explain the provisions, and particularly the duration of the lease.

Defendants contended that the original three (3) years duration of the lease was in conflict with the inserted verbiage which required an annual review for renewal of the contract and parol testimony should be permitted to explain the apparent inconsistencies between the two provisions.

Immediately prior to trial, the plaintiff submitted a Motion In Limine, seeking to exclude parol testimony. The Trial Court ruled that the original provision for a three years lease, and the inserted verbiage which required an annual review between the parties as a prerequisite to renewal, were in conflict and parol testimony would be permitted to explain the parties intent.

(R-98-99).

Disposition at Trial.

Trial was held on the 14th day of November, 1991, before the Honorable Frank G. Noel, sitting without a jury. The court admitted testimony of the parties to explain the apparent conflict between the original lease duration of three years and the inserted verbiage which required the negotiation between the parties for renewal of the contract each year.

At the conclusion of the evidentiary portion of the trial, the Trial Court found that defendants' explanation of the conflicting verbiage was more plausible than the explanation given by plaintiff and plaintiff's predecessor, McMullin and Company. (R-127, para. 27). The Trial Court entered judgement no cause of action in favor of the defendants because plaintiff refused to "jointly review the contract for renewal" when requested to do so by the defendants. (R-128a, para. 6.)

The Trial Court further awarded attorneys' fees to the defendants pursuant to Section 78-27-56.5, Utah Code Annotated, 1953, as amended. The Trial Court explained that the lease agreement provided for attorney's fees if an action is brought "during the term of the lease." Since the Court found in defendants' favor, the Court determined that the lease had terminated before the action had been initiated and, thus, the attorney's fee provision in the lease was inapplicable. However, since plaintiffs would have been entitled to attorney's fee had it prevailed, the Trial Court utilized the provision of Section 78-27-56.5, Utah Code

Annotated, 1953, as amended, to award attorney's fees. (T-129, para. 10 and 11, T-13, para. 2)

Plaintiff appeals from that judgment.

RELEVANT FACTS

The lease agreement and the inserted provisions were prepared exclusively by the plaintiff's predecessor in interest, Richard Bruce McMullin. (T-26, lns. 21-25.) Initially, the lease form reflected a duration of three years with increasing lease payments each year. Before execution of the lease, Defendants requested that verbiage be included which would permit them to terminate the lease after the first year in the event they were not able to continue on the lease because of inadequate business revenue. (T-47, lns. 22-25, T-48, lns. 1-13). Mr. McMullin inserted the typewritten sentence, last sentence, page 6, paragraph 9, of the lease agreement, which reads, "At the end of each year, the tenant and the landlord will jointly review the contract for renewal." Shortly after the lease was signed by the defendants, McMullin and Company sold its interest to the property and assigned the lease to the plaintiff.

At the expiration of the first year of the lease, defendants went to plaintiff's office and asked to review the lease with Mr. Roy S. Ludlow. Mr. Ludlow refused to "review the lease for renewal" or negotiate any provisions of the lease with the defendants. Defendants notified plaintiff that they were terminating tenancy and vacated the premises. (T-42, lns 1-16). This lawsuit ensued.

During the course of this case, Plaintiff offered the Trial Court, three separate and distinct explanations for the typewritten sentence on page 6, paragraph 9, of the lease. In plaintiff's Memorandum In Support of its Motion In Limine to exclude parol testimony, plaintiff argues that the typewritten verbiage in paragraph 9 was intentionally placed in that paragraph as it specifically applied only to that paragraph. (R-64). Paragraph 9 is entitled "Continuous Operation." The Trial Court, in denying plaintiff's Motion In Limine, ruled that the typewritten sentence did not appear to relate to paragraph 9 only and, if it did apply to paragraph 9 only, it was unclear how it applied exclusively to that provision. The Court suggested that the inserted sentence in paragraph 9 appeared to apply to the entire contract. The Trial Court thus concluded that parol testimony should be permitted to explain the ambiguity created by the insertion of the last sentence of paragraph 9, page 6, of the Lease. (R-98, 99).

At trial, plaintiff's predecessor, Bruce McMullin, testified that the typewritten provision in paragraph 9 pertained to the Common Area Maintenance (CAM) costs only. (T-18, lns. 23-25). Finally, by rebuttal testimony of Mr. McMullin, plaintiff contended that the typewritten verbiage was intended to take effect only if the defendant, Design Label partnership, went into bankruptcy and the individual signatories on the lease agreement needed relief from the obligations of the lease agreement. (T-116, lns. 14-25, T-117, lns. 1-25, T-118, lns. 1-25, T-119, lns. 1-11).

Defendants, Delbert Christensen, Paul Ostler, Thomas Ostler and Neil Ostler, testified that the typewritten sentence in paragraph 9 of the lease was inserted by Mr. McMullin after the defendants had voiced concern over the three (3) years term of the lease because the defendants' business venture was recently initiated and the defendants were unsure that they could continue in this venture after the first year. (T-47, lns. 23-25, T-48, lns. 1-12, T-69, lns. 18-25, T-90, lns. 10-13, T-100, lns. 14-17).

It is undisputed that the defendants fully performed under the lease agreement for the first full year. It is further undisputed that the defendants went to plaintiff's office and requested a joint review for renewal of the contract, but the plaintiff categorically refused to discuss any provisions of the lease. (T-79, lns. 1-17). It is also undisputed that plaintiff's predecessor prepared the contract and provided the verbiage of the last sentence in paragraph 9, page 6, which is the basis for the present controversy. (T-26, lns. 21-24).

The Trial Court granted the defendants judgment, no cause of action, and awarded attorneys' fees pursuant to Section 78-27-56.5 Utah Code Annotated, 1953, as amended. Plaintiff objected to the award of attorneys' fees because plaintiff contends a counter-claim should have been filed by defendants if they sought attorney's fees to defend against plaintiffs's complaint. Although defendants did not file counterclaims seeking attorneys' fees, defendants' Answer to plaintiff's complaint included a prayer for attorneys' fees.

SUMMARY OF ARGUMENTS

1. The Trial Court was correct in ruling that the typewritten verbiage created an ambiguity as to the duration of the lease and parol testimony could be admitted to explain the ambiguity.

2. The award of attorneys' fees to the defendant was authorized and proper under Section 78-27-56-5, Utah Code Annotated, 1953, as amended.

3. Defendants should be awarded attorneys' fees for defending this appeal, pursuant to Section 78-27-56.5, Utah Code Annotated, 1953, as amended.

4. The plaintiff's appeal is frivolous and without merit and plaintiff should be assessed double costs pursuant to Rule 33, Utah Rules of Appellate Procedure.

DETAILS OF ARGUMENTS

I. THE TRIAL COURT WAS CORRECT IN RULING THAT THE TYPEWRITTEN SENTENCE IN PARAGRAPH 9, PAGE 6, CREATED AN AMBIGUITY AS TO THE DURATION OF THE LEASE AND PAROL TESTIMONY WAS PROPERLY ADMITTED.

Plaintiff originally contended that the typewritten sentence in paragraph 9, page 6, was intended to clarify or add to the provisions of that paragraph only and that the sentence was not intended to apply to any other provision of the lease agreement, certainly not to the provisions defining the duration of the lease.

Paragraph 9 of the lease is entitled "Continuous Operation." The provision, without the typewritten sentence, reads:

> "Tenant covenants to operate all of the Premises continuously during the entire term of this Lease with due diligence and efficiency so as to produce a maximum volume of gross sales, unless prevented from doing so by causes beyond Tenant's control. Subject to inability by reason of strikes or labor disputes, Tenant shall keep and maintain at all times within and upon the Premises a stock of merchandise of such size, character and quality as shall be reasonably designed to produce the maximum volume of gross sales and shall keep on the Premises at all times sufficient personnel to service the usual and ordinary demands and requirements of its customers. Tenant shall conduct its business on the Premises during the regular customary days and hours for such type of business in the city or trade . . ."

Inserted by typewriter at the end of page 6 and in the middle of the printed paragraph 9 is the sentence that reads,

> "At the end of each year, the tenant and the landlord will jointly review the contract for renewal."

It is obvious that the inserted sentence is not consistent with paragraph 9 and is inapplicable to that provision. Plaintiff offered no explanation at trial as to its contention that the added sentence applied only to paragraph 9 of the lease where the sentence was inserted. Thus, the Trial Court was correct in its ruling that if the added sentence did apply to paragraph 9 exclusively, parol testimony was required to explain how the sentence affected that paragraph or how it was to be incorporated into that paragraph.

Plaintiff's second explanation of the typewritten sentence was that it applied solely to the common area maintenance costs (CAM costs) (T-18, lns. 23-25). However, assuming that explanation to be true, plaintiff's witness, Mr. McMullin was

unable to clearly explain why the specific language was used in the typewritten sentence. Mr. McMullin testified that he had no recollection of why the specific verbiage was selected nor why the sentence was inserted as the last sentence in paragraph 9 of the lease. (T-22, lns. 1-23, T-23, lns. 8-19). If the sentence really applied to the common area maintenance costs, the specific wording of the sentence is unquestionably ambiguous.

Plaintiff's third and last explanation, that the sentence was intended to apply only in the event the defendants' business partnership went into bankruptcy is even more puzzling than plaintiff's prior explanations. If the sentence applied only to save the individual partners from personal liability after the business was bankrupt, why would the parties review the lease for renewal where there was no longer any business to be conducted by the defendants? Even Mr. McMullin could not explain the obvious anomaly of that claim. (T-120, lns. 19-25, T-121, lns. 1-9).

Under any of plaintiff's three explanations of the sentence in question, the agreement was clearly ambiguous as to its duration. In Colonial Leasing Company Of New England, Inc. v. Larsen Brothers Construction Co., 731 P.2d 483, (Utah, 1986), Justice Stewart stated:

> "It is the general rule that if an agreement is ambiguous because of lack of clarity in the meaning of particular terms, it is subject to parol evidence as to what the parties intended with respect to those terms. "

In Plateau Mining, Justice Stewart reaffirmed the ruling in Colonial Leasing and stated:

> "Parol evidence is generally not admissible to explain the intent of a contract which is clear on its face. (citations omitted) But if a contract is ambiguous, parol evidence is admissible to explain the parties' intent. Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483, 487 (Utah 1986); Faulkner, 665 P.2d at 1293. Whether a contract is ambiguous is a question of law which must be decided before parol evidence is admitted. Faulkner, 665 P.2d at 1293. . . . (Emphasis added)
>
> "When ambiguity does exist, the intent of the parties is a question of fact to be determined by the jury. Colonial Leasing Co., 731 P.2d at 488. Failure to resolve an ambiguity by determining the parties' intent from parol evidence is error. Winegar v. Smith Inv. Co., 590 P.2d 348, 350 (Utah 1979). If a contract is ambiguous, the court may consider the parties' actions and performance as evidence of the parties' true intention." (Emphasis added).

In this case, Judge Noel ruled that the questioned sentence created an ambiguity as to the duration of the lease. He, therefore, permitted parol testimony to clarify the intent of the parties. He then made a factual determination that the parties intended and were obligated to jointly review the lease each year to renew the contract for another year.

On appeal, plaintiff contends that the Trial Court erred in finding that the lease provision relating to the duration of the lease was ambiguous. Yet, plaintiff offers no further insight as to the possible reconciliation of the apparent conflict between the typewritten sentence in paragraph 9 and the duration specified in paragraph 2 of the lease agreement. Plaintiff merely states that "The subjective determinations which are claimed by the appellees and which were thought by Mr. McMullin are different; Mr. McMul-

lin's position being that upon bankruptcy of the business or termination of the business that he would, thereafter, do an equitable review of the contract to work out some type of solution with appellees as compared to the appellees who now state that; if they were in some sort of financial difficulty that they would leave." (Appellant's Brief, p. 7). This explanation does nothing to support plaintiff's contention that there was no ambiguity in the lease agreement. It merely attempts to paraphrase Mr. McMullin's testimony as to the sentence inserted in paragraph 9. Since the explanation advanced by plaintiff through Mr. McMullin is not clearly evident from the verbiage of the inserted sentence, it serves as an admission that the sentence, even standing alone, may have been ambiguous, thus justifying parol testimony.

Plaintiff further argues that "Even if parol evidence is allowed, it is readily apparent that the trial court wrongfully ruled against the appellant and ruled in behalf of the appellees." (Appellant's Brief, p. 8). In challenging the Trial Court's factual determination, the plaintiff is obligated to prove that Trial Court's findings on the factual issues were clearly erroneous. In Jarman, the Court stated:

> "The intent of the parties is a factual determination. This Court will not reverse a trial court's findings on factual issues unless they are clearly erroneous. (Citations omitted) Further, 'The burden (on appellants) of overturning factual findings is a heavy one, reflective of the fact that we do not sit to retry cases submitted on disputed facts.' We give great deference to the trial court's findings, especially when they are based on an evaluation of conflicting live testimony."

Plaintiff has failed in its burden to resolve the apparent ambiguity and has failed to show that the Trial Court was clearly in error in its factual determination of the parties' intent.

II. THE TRIAL COURT HAS DISCRETION TO AWARD ATTORNEY'S FEES PURSUANT TO SECTION 78-27-56.5, UTAH CODE ANNOTATED, 1953, AS AMENDED, WHERE THE CONTRACT PROVIDED ATTORNEY'S FEES IN THE EVENT PLAINTIFF PREVAILED.

Plaintiff asserts that the Trial Court erred in awarding attorney's fees pursuant to Section 78-27-56.5, Utah Code Annotated, 1953, as amended, because the defendants did not plead by counter-claim their entitlement to attorneys' fees under that statute. Although the statutory authority for award of attorneys' fees was not specifically pled, defendants' answers contain a prayer for attorneys' fees.

Apparently, plaintiff believes that defendants cannot be awarded attorneys' fee unless they file a counter-claim specifically seeking attorneys' fees to defend the action. However, Plaintiff fails to cite any authority to support its contention that attorney's fees must be pled in a counterclaim before the court can award the same.

The wording of Section 78-27-56.5, Utah Code Annotated, 1953, as amended, is clear and unambiguous. The statute reads:

> ATTORNEY'S FEES-RECIPROCAL RIGHTS TO RECOVER ATTORNEY'S FEES.
>
> "A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written

> contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees."

There is no requirement that either party plead, by way of counterclaim, their right to reciprocal attorney's fees. Indeed, there is no prerequisite that statutory right to attorney's fee be pled. In this case, the plaintiff would have been entitled to attorney's fee had it prevailed. The defendants are, therefore, entitled to award of attorney's fees under the reciprocal rights statute.

Plaintiff's argument on the issue of attorney's fee is clearly frivolous.

Even if the defendants' request for attorney's fees should have been pled as a counter-claim, defendants' prayer for attorney's fees in their answer to plaintiff's complaint was sufficient to justify the Court's award of attorney's fees.

In Redevelopment Agency of Salt Lake City v. Dasakalas, 785 P.2d 1112 (Utah Ct. Appls., 10/11/89), Judge Garff stated:

> "Thus pleadings may be amended even when evidence is objected to at trial on the ground that it raises issues not framed by the pleadings. (Citations omitted) 'Although Rule 15 . . . tends to favor granting of leave to amend, the matter remains in the sound discretion of the trial court.' (Citations omitted). Therefore, the trial court was within its discretion in concluding that the pleadings could be amended to include attorney's fees even though not initially raised by the pleadings."

III. DEFENDANTS SHOULD BE AWARDED ATTORNEY'S FEES FOR THIS APPEAL.

The wording of Section 78-27-56.5, Utah Code Annotated, 1953, as amended, is sufficiently broad to permit the award of attorney's fee on appeal where the prerequisite written document or contract provides for attorney's fee at least to one of the parties to the action. The statute provides that "A court may award costs and attorney's fees when one party to the contract would be entitled to attorney's fees in the event it prevailed." The statutory language, "A court" is synonymous with the statement "Any court" may award attorney's under the circumstances provided. Defendants contend the statute contemplates award of attorney's fees by Appellate Courts, when appropriate. Thus, the defendants should be awarded attorney's fees on this appeal pursuant to Section 78-27-56.5, Utah Code Annotated, 1953, as amended.

IV. PLAINTIFF'S APPEAL IS FRIVOLOUS AND PLAINTIFF OR ITS ATTORNEY OR BOTH SHOULD BE ASSESSED DOUBLE COSTS AND ATTORNEY'S FEE PURSUANT TO RULE 33, UTAH RULES OF APPELLATE PROCEDURE.

Plaintiff advances two arguments on appeal which are clearly without merit.

The first argument is to the effect that the lease agreement was not ambiguous and, therefore, the Trial Court should not have admitted parol testimony. Yet, plaintiff failed at trial and has failed in this appeal to provide a reasonable explanation which would harmonize the apparently conflicting provisions of paragraph 2 and the last sentence of paragraph 9, page 6, of the

lease.

In fact, plaintiff's sole witness on that issue, Mr. McMullin, admitted on several instances that he did not understand the inserted sentence or why it was inserted where it was and further admitted that the sentence created an ambiguity.

Mr. McMullin testified:

"THE WAY IT'S WORDED HERE . . . I'M EMBARRASSED TO HAVE WRITTEN IT IN SUCH A WAY BECAUSE IT IS AMBIGUOUS AND I DON'T RECALL EXACTLY WHAT IT PERTAINED TO. . . " (T-18, lns. 16-19.)

THE COURT: "SO WHY WOULD YOU PUT THAT IN THIS LEASE IN TYPEWRITTEN FORM IF IT WOULDN'T BE IN THE OTHER LEASES, APPARENTLY?

THE WITNESS: I DON'T KNOW. MAYBE WE OUGHT TO ASK THEM (DEFENDANTS) WHY I PUT IT IN. I DON'T HAVE ANY IDEA.

THE COURT: YOU HAVE NO RECOLLECTION WHY?

THE WITNESS: I REALLY DON'T YOUR HONOR. I DON'T RECALL THE PURPOSE OF IT. TO ME IT DOESN'T MAKE A LOT OF SENSE THE WAY IT'S PRESENTED HERE. I'M EMBARRASSED THAT IT'S EVEN IN HERE." (T-19, lns. 5-14).

Q. "AS TO THAT LAST SENTENCE, IF IT IS YOUR ASSUMPTION THAT IT REFERS TO COMMON AREA MAINTENANCE COSTS, DO YOU HAVE ANY RECOLLECTION AS TO WHY IT'S PLACED IN PARAGRAPH 9 RATHER THAN IN PARAGRAPH 5?

A. I DON'T. THE WAY IT'S PLACED REALLY DOESN'T MAKE ANY SENSE TO ME. AND NORMALLY I WOULD INITIAL SUCH ADJUSTMENTS. AND I DON'T---MAYBE THE OSTLERS AND DALE CHRISTENSEN WOULD HAVE A

BETTER RECALL. I REALLY DON'T RECALL WHAT THE INTENT OF THAT PARTICULAR SENTENCE WAS, PLACED WHERE IT WAS, WITHOUT REFERENCE TO ANOTHER PART OF THE CONTRACT. IT'S CONFUSING TO ME." (T-23, lns. 8-19)

Q. ". . . WHY DID YOU INSERT THE WORD "REVIEW THE CONTRACT FOR RENEWAL?"

A. I DON'T KNOW WHY I PUT THAT. THE WAY IT WAS---IT WAS STATED POORLY, I ADMIT THAT." (T-121, lns. 1-4).

Although Mr. Roy Ludlow did not participate in the drafting of the lease agreement, he also admitted that the contract was ambiguous. Mr. Ludlow testified:

Q. "MR. LUDLOW, AT THE TIME YOU MET WITH THE DEFENDANTS DID YOU HAVE OCCASION TO DISCUSS PARAGRAPH NUMBER 9 ON PAGE 6?

A. YES. THAT'S HOW I BECAME AWARE OF IT.

Q. AND YOU THOUGHT AT THAT TIME THAT THAT PERTAINED TO CAM CHARGES; IS THAT CORRECT?

A. I HAD NO IDEA WHAT IT WAS. I LOOKED AT IT AND READ THE CONTRACT. AND I COULDN'T UNDERSTAND . . . " (T -112, lns. 5-12)

Plaintiff's President, Mr. Ludlow, and plaintiff's only other witness, Mr. McMullin, both admitted the ambiguity and were unable to provide a reasonable explanation to clarify the ambiguity. As defendants indicated earlier, plaintiff has yet to provide justification of its assertion in this appeal that there was no ambiguity. Plaintiff's appeal of this issue is frivolous.

In Hunt, the Utah Supreme Court defined a frivolous

appeal as "one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." (Citations omitted.) An amendment to Rule 33, Utah Rules of Appellate Procedure, which has been adopted by this Court effective April 1, 1990, states: "For the purpose of these rules, a frivolous appeal. . . is one that is not grounded in fact, not warranted by the existing law, or not based on a good faith argument to extend, modify or reverse existing law."

In West Valley City v. Majestic Investment Co., 818 P.2d 1311, (Utah, 1991), the Court stated:

> "The challenging party must marshall all relevant evidence presented at trial which tends to support the findings and demonstrate why the findings and all reasonable inferences drawn therefrom are against the clear weight of the evidence."

Plaintiff has ignored its burden on appeal and, instead, has selectively cited statements out of context in an attempt to bolster its argument that the evidence did not support the Trial Court's factual determination. Plaintiff's appeal of the issue of admissibility of parol testimony to explain an ambiguous contract is clearly without merit and is not based on a good faith argument.

Similarly, plaintiff's appeal on the award of attorneys' fees is also without merit.

As with the issue of ambiguity of contract and the admission of parol testimony, plaintiff advances a naked, unsupported assertion that the Trial Court erred in awarding defendants attorneys' fees, but plaintiff fails to direct the Court to any

precedent or authority to support its claim of error.

Plaintiff's lack of good faith in appealing the Trial Court's judgment is illustrated by the following synopsis of plaintiff's argument on appeal:

1. There was no ambiguity in the lease agreement. Plaintiff's only witnesses, Mr. McMullin and Mr. Ludlow, both admitted they did not understand the typewritten sentence in paragraph 9, page 6, of the lease and Mr. McMullin, the author of the sentence, admitted on numerous occasions that the sentence was ambiguous and the placement of the sentence in the contract was baffling.

2. The Trial Court erred in permitting parol testimony to explain the ambiguity.

The Utah Supreme Court and the Utah Court of Appeals have repeatedly affirmed that parol testimony is and should be permitted to clarify ambiguity.

3. Even if the contract was ambiguous, the Trial Court erred in awarding judgment of no cause of action to defendants because defendants were obligated to prove, "Under appellees own theory they needed to prove that the business was financially unsound and could not longer tolerate the rent" (Appellant's Brief, p. 8) Further, that "Appellees had a continuing obligation to remain at the premises and either make a go of their business at that location or go bankrupt even under their own testimony." (Appellant's Brief, p. 9)

Plaintiff fails to indicate where this provision was

incorporated into the lease agreement or how the inserted verbiage can be construed to require such a burden on the defendants.

4. The Trial Court erred in awarding attorneys' fee pursuant to Section 78-27-56.5, Utah Code Annotated, 1953, as amended, because it was not pled as a counter-claim or as an affirmative defense. (Appellant's Brief, p. 9)

Plaintiff fails to cite any authority for either of these contentions.

CONCLUSION

The Trial Court was correct in its ruling that the lease agreement was clearly ambiguous given the insertion of the last sentence of paragraph 9, page 6, of the agreement, and especially considering the location of that sentence under the paragraph governing "Continuous Operations." Consequently, the Trial Court was correct in permitting parol testimony to explain the obvious ambiguity.

Plaintiff's challenge of the Trial Court's factual findings clearly fails because plaintiff has not shown that the Trial Court's factual determinations are clearly erroneous. Plaintiff merely submits an obscure argument to the effect that, given the Trial Court's determination that the agreement was ambiguous, the defendants were obligated to prove, and the Trial Court was obligated to find, that the defendants had to either remain at the location in question and "make a go of the business or go bankrupt."

Plaintiff's appeal on the issue of attorneys' fee is

obviously frivolous. Plaintiff fails to direct the Court to any precedent or support for the proposition that attorney's fees must be pled as a counter-claim. The statute clearly provides the Trial Court's authority to award attorneys' fees under the facts of this case.

Plaintiff's appeal is clearly frivolous and violates Rule 33, Utah Rules of Appellate Procedure, and Rule 11, Utah Rule of Civil Procedure. If counsel for plaintiff has a personal interest in Roy S. Ludlow Investment Company, the plaintiff in this case, it is possible that such interest compromised counsel's objectivity in assessing the merits of plaintiff's appeal.

The Trial Court's judgment should be affirmed and the case remanded to the Trial Court for determination of attorney's fees for the appeal and all post-judgment motions and responses.

Defendants should be awarded attorneys' fees to defend this appeal and double costs and such other sanctions as the Court deems appropriate.

Respectfully submitted.

Kenneth M. Hisatake

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and accurate copies of the foregoing Brief of the Appellees, Lee H. Ostler, Paul F. Ostler, Delbert Christensen, Individually and doing Business as Custom Design Label Manufacturing, to:

Randy S. Ludlow, Esq.
Attorney for Plaintiff
311 S. State, Suite 280
Salt Lake City, Utah 84111

John Burton Anderson, Esq., and
Kevin V. Olson, Esq.
Anderson & Dunn
Attorney for Defendants Thomas W. Ostler,
Neil W. Ostler and John A. Vandermyde
2089 East 7000 South, Suite 200
Salt Lake City, Utah 84121

this 17th day of July, 1992.

D7RSLCA.6

ADDENDUM

Exhibit A	Rule 11, Utah Rules Of Civil Procedure
Exhibit B	Rule 33, Utah Rules of Appellate Procedure
Exhibit C	Sec. 78-2a-3(2)(j), Utah Code Annotated, 1953, as amended
Exhibit D	Sec. 78-27-56.5, Utah Code Annotated, 1953, as amended
Exhibit E	Minute Entry from Judge Noel (R-98-100)
Exhibit F	Order on Motion in Limine signed by Judge Noel (R-115-116)
Exhibit G	Lease Agreement (R-67-85)
Exhibit H	Findings of Fact and Conclusions of Law (R-121-130)
Exhibit I	Judgment (R-131-134)

EXHIBIT A

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when other-

wise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
(Amended effective Sept. 4, 1985.)

Compiler's Notes. — This rule is substantially similar to Rule 11, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary. Calder v. Third Judicial Dist. Court ex rel. Salt Lake County, 2 Utah 2d 309, 273 P.2d 168 (1954).

Nature of duty imposed.

This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. Clark v. Booth, 168 Utah Adv. Rep. 7 (1991).

Reasonable inquiry.

Certification by an attorney "that to the best of his knowledge, information, and belief formed after a reasonable inquiry the complaint is well grounded in fact and is warranted by existing law" does not require him to obtain a favorable expert medical opinion before filing a medical malpractice action. Deschamps v. Pulley, 784 P.2d 471 (Utah Ct. App. 1989).

Violation.

—Question of law.

Whether specific conduct amounts to a violation of this rule is a question of law. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989); Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).

—Sanctions.

This rule gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

Imposition of $5,000 in attorney fees as a sanction for violating this rule was not an abuse of discretion, where the wrong document was attached to the complaint, causing defendants to incur legal expense in researching the validity of an irrelevant document and preparing a motion to dismiss based thereon. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

—Standard.

Sanctions were improper against an attorney, where opposing parties conceded that no

EXHIBIT B

parties appeal, 11 A.L.R.4th 1099.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Key Numbers. — Interest ⇨ 39(2).

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

NOTES TO DECISIONS

ANALYSIS

Frivolous appeal.
—Defined.
—Sanctions.
Cited.

Frivolous appeal.

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. Eames v. Eames, 735 P.2d 395 (Utah 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action against defendant orthodontist and found that he could not prove breach of duty or causation, the record was devoid of any relevant, admissible evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. Hunt v. Hurst, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. Utah Dep't of Social Servs. v. Adams, 806 P.2d 1193 (Utah Ct. App. 1991).

—Defined.

For purposes of this rule, a "frivolous" appeal is one having no reasonable legal or factual basis. Lack of good faith is not required.

O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987).

A frivolous appeal is one without reasonable legal or factual basis. Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Utah Ct. App. 1988); Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989).

—Sanctions.

Sanctions for frivolous appeals should only be applied in egregious cases, to avoid chilling the right to appeal erroneous lower court decisions. However, sanctions should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing. Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988); Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989).

Cited in Barber v. Barber, 792 P.2d 134 (Utah Ct. App. 1990); Hurt v. Hurt, 793 P.2d 948 (Utah Ct. App. 1990); Mahas v. Rindlisbacher, 808 P.2d 1025 (Utah 1990); Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah Ct. App. 1990); Mont Trucking, Inc. v. Entrada Indus., Inc., 802 P.2d 779 (Utah Ct. App. 1990); Allred v. Allred, 807 P.2d 350 (Utah Ct. App. 1991); Walters v. Walters, 160 Utah Adv. Rep. 47 (Ct. App. 1991); Griffin v. Memmott, 164 Utah Adv. Rep. 33 (Ct. App. 1991); Hinckley v. Hinckley, 167 Utah Adv. Rep. 16 (Ct. App. 1991); Larson v. Overland Thrift & Loan, 171 Utah Adv. Rep. 60 (Ct. App. 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error § 912.

C.J.S. — 5 C.J.S. Appeal and Error § 1358.

A.L.R. — Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

Key Numbers. — Costs ⇐ 259 to 263.

EXHIBIT C

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22.

Amendment Notes. — The 1988 amendment by ch. 73, effective April 25, 1988, inserted subsection designations (a) and (b) in Subsection (1); inserted "resulting from formal adjudicative proceedings" in Subsection (2)(a); substituted "state agencies" for "state and local agencies" in Subsection (2)(a); substituted "informal adjudicative proceedings of the agencies" for "them" in Subsection (2)(a); deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted Subsection (b); redesignated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); added "except those from the small claims department of a circuit court" at the end of Subsection (2)(d); and made minor stylistic changes.

The 1988 amendment by ch. 210, effective April 25, 1988, added Subsection (2)(h) and redesignated former Subsection (2)(h) as Subsection (2)(i).

The 1988 amendment by ch. 248, effective April 25, 1988, in Subsection (2)(a), rewrote the phrase before "except" which had read "the final orders and decrees of state and local agencies or appeals from the district court review of them"; deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted present Subsection (2)(b); designated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); and substituted "first degree or capital felony" for "first or capital degree felony" in present Subsection (2)(f).

The 1990 amendment by ch. 80, effective April 23, 1990, rewrote Subsection (2)(g), which read "appeals from orders on petitions for extraordinary writs involving a criminal conviction, except those involving a first degree or capital felony" and made punctuation changes in Subsections (2)(h) and (3).

The 1990 amendment by ch. 224, effective April 23, 1990, inserted the subdivision designation (i) in Subsection (2)(b) and added Subsection (2)(b)(ii), and made related stylistic changes.

The 1991 amendment, effective January 1, 1992, substituted "a court of record" for "district court" in Subsection (2)(f).

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

EXHIBIT D

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct, 31 A.L.R. Fed. 833.

78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

History: C. 1953, 78-27-56.5, enacted by L. 1986, ch. 79, § 1.

NOTES TO DECISIONS

Cited in Carr v. Enoch Smith Co., 781 P.2d 1292 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

A.L.R. — Attorney's liability under state law for opposing party's counsel fees, 56 A.L.R.4th 486.

EXHIBIT E

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

ROY S. LUDLOW INVESTMENT CO.,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 890903593 CV
vs.	:	JUDGE FRANK G. NOEL
THOMAS W. OSTLER, et al.,	:	
Defendants.	:	

Now before the Court is plaintiff's Motion in Limine. The Court has reviewed the memos filed in support of and in opposition thereto, has reviewed the Lease itself and now rules as follows:

Plaintiff seeks to exclude parole evidence in the nature of an interpretation of the Lease Agreement. Page 1 of the Lease establishes the length of term for the Lease to be three (3) consecutive full years. In Page 6 of the Lease under the paragraph entitled "Continuous Operation" the parties have typed in the sentence "At the end of each year the tenant and landlord will jointly review the contract for renewal." That sentence does not appear to apply exclusively to paragraph 9 (Continous

Operation) of the Lease. If it does appear exclusively to Paragraph 9 it is not clear on it's face how it does so. The subject sentence would appear to apply more appropriately to the entire Lease Agreement. However if that is the case there is an inconsistency between that statement and Paragraph 2 of the Lease which sets the length of term at three (3) years.

Under all of these circumstances the Court is of the opinion that the subject sentence is indeed ambiguous as used in the context of this Lease and rules that it would be helpful to the trier of fact to receive parole evidence to explain this particular provision of the Lease, and accordingly will deny plaintiff's Motion in Limine.

Counsel for defendants is to prepare an order consistent with this ruling.

DATED this 6th day of November, 1991.

FRANK G. NOEL
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 6th day of November, 1991:

Randy S. Ludlow
Attorney for Plaintiff
311 South State, Suite 280
Salt Lake City, Utah 84111

Kenneth Hisatake
Attorney for Defendant McGowan
1825 South 700 East
Salt Lake City, Utah 84105

John Burton Anderson
Kevin V. Olson
ANDERSON & DUNN
Attorneys for Defendants
2089 East 7000 South, Suite 200
Salt Lake City, Utah 84121

Jennie Olson

EXHIBIT F

KENNETH M. HISATAKE #1505
Attorney for Defendants Lee Ostler, Paul Ostler, Christensen, and Custom Design Label Manufacturing
1825 South Seventh East
Salt Lake City, Utah 84105
Telephone: (801) 486-3541

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROY S. LUDLOW INVESTMENT COMPANY, Plaintiff, vs. THOMAS W. OSTLER, NEIL W. OSTLER, LEE H. OSTLER, PAUL F. OSTLER, JOHN A. VANDERMYDE, DELBERT CHRISTENSEN, individually and all doing business as DESIGN LABEL MANUFACTURING, Defendants.	:	ORDER Civil No. 890903593CV (Judge Frank G. Noel)

Plaintiff submitted a Motion In Limine to exclude parol evidence proposed to be offered by the Defendants to explain the terms of the lease agreement, which is the subject matter of this action. Defendants contend that the provisions of the lease are conflicting and ambiguous and parol evidence should be permitted to explain the intent of the parties to clarify the ambiguous provisions.

Plaintiff contends that the lease agreement is not ambiguous and, therefore, no parol evidence should be admitted.

The Court, having reviewed the Motion and Memorandum submitted by the Plaintiff and the Defendants' Response to said

Motion and having reviewed the lease and being fully advised in the premises,

IT IS HEREBY ORDERED that the Plaintiff's Motion In Limine be and is hereby denied.

DATED this 20 day of November, 1991.

FRANK G. NOEL
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing Order, postage prepaid, to:

Randy S. Ludlow, Esq.
Attorney for Plaintiff
311 S. State, Suite 280
Salt Lake City, Utah 84111

John Burton Anderson, Esq., and
Kevin V. Olson, Esq.
Anderson & Dunn
Attorney for Defendants Thomas W. Ostler,
Neil W. Ostler and John A. Vandermyde
2089 East 7000 South, Suite 200
Salt Lake City, Utah 84121

this 9th day of November, 1991.

D7RSL.32

EXHIBIT G

LEASE AGREEMENT

THIS LEASE is entered into this 1st day of April, 19 87, between McMullin & Company ("Landlord"), and Design Label Manufacturing ("Tenant", whether one or more).

1. PREMISES

In consideration of the rents, covenants and agreements contained herein, Landlord leases to Tenant, and Tenant leases from Landlord certain commercial space comprising a building or portion (Space Number _____) of a building containing approximately 2800 square feet in the East Building Shopping Center (the "Shopping Center"), located in the City of West Jordan, County of Salt Lake, State of Utah. The leased commercial space is referred to herein the "Premises" and the location, dimensions, and approximate area thereof are delineated in red on Exhibit "A".

2. TERM

2.1 Length of Term. The term of this Lease shall be for a period of Three (3) consecutive full Years.

2.2 Commencement Date and Obligation to Pay Rent. The Commencement Date for this Lease Agreement and Tenant's obligation to pay rent hereunder shall commence upon

May 1, 1987 with $500.00 base rent plus $100.00 CAM
May 1, 1988 with $600.00 base rent plus $100.00 CAM
May 1, 1989 with $700.00 base rent plus $100.00 CAM

2.3 Lease Year Defined. The term "Lease Year" as used herein shall mean a period of twelve (12) full consecutive calendar months.

2.4 Tenant's Certificate. Tenant shall, within fifteen (15) days after the Commencement Date, and thereafter at Landlord's request, execute and deliver to Landlord a written declaration in recordable form: (1) ratifiying this Lease; (2) expressing the Commencement Date and termination date hereof; (3) certifying that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended (except by such writing as shall be stated); (4) that all conditions under this Lease to be performed by Landlord have been satisfied; (5) that there are not defenses or offsets against the enforcement of this Lease by the Landlord, or stating those claimed by Tenant; (6) the amount of advance rental, if any, (or none if such is the case) paid by Tenant; (7) the date to which rental has been paid; (8) the amount of security deposited with Landlord; and (9) such other information as Landlord may reasonably request. Landlord's mortgage lenders and/or purchasers shall be entitled to rely upon such declaration.

3. MINIMUM GUARANTEED RENT

3.1 Monthly Rent. Tenant agrees to pay to Landlord at such place as Landlord may designate, without prior demand therefore and without any deduction or setoff whatsoever, and as fixed minimum rent, the sum of Six hundred only---------- ($ 600.00) in advance on the first day of each calendar month during the term of the Lease. Simultaneously with the execution hereof, Tenant has paid to Landlord the first month's rent, receipt whereof is hereby acknowledged, subject to collection, however, if made by check. In the event the Commencement Date occurs on a day other than the first day of the month, then rent shall be paid on the Commencement Date for the initial fractional month prorated on a per-diem basis.

3.2 Adjustment to Minimum Guaranteed Rent. The minimum monthly rental set forth in Section 3.1 shall be subject to being increased in accordance with changes in the Consumer price Index (referred to herein as the "Price Index" and defined in Section 34.12). The minimum monthly rent shall be adjusted in accordance with the following provisions:

(a) The Price Index for the month of September immediately preceding the Commencement Date shall be designated as the Base Price Index.

(b) As of the first day of each full Lease Year, the monthly rental set forth in Section 3.1 shall be adjusted by multiplying such monthly rental by a fraction, the numerator of which is the Price Index for the prior September and the denominator of which is the Base Price Index. Tenant shall pay the adjusted minimum monthly rental until the rent is readjusted pursuant to this subsection (b) for the following Lease Year.

(c) No such adjustment shall reduce the monthly rental below the minimum monthly rental specified in Section 3.1.

Landlord shall give Tenant written notice of the adjusted rent; provided, failure to give timely notice shall not partially or fully waive or stop Landlord from collecting the full amounts of all rental adjustments, whether retroactively or otherwise, after it gives such notice.

4. PERCENTAGE RENT

4.1 Calculation of Rental.

(a) In addition to the minimum monthly rent, as adjusted from time to time, Tenant agrees to pay Landlord a percentage rent equal to the sum of _____ percent (____%) of gross sales in excess of _____ ($_____) during any calendar year or fraction thereof. Each calendar year or fraction thereof shall be considered as an independent accounting period for the purpose of computing the amount of percentage rent, if any. Said percentage rent shall be payable at such place as Landlord may designate, without any prior demand therefor and, except as may be provided hereinafter, without any setoff or deduction whatsoever.

(b) Percentage rental shall be paid quarterly. Percentage rent with respect to each calendar quarter (or fraction thereof) shall be paid on or before the fifteenth (15th) day of the succeeding calendar quarter at the end of the term, on or before the fifteenth (15th) day following the end of the term of this Lease. Each quarterly payment of percentage rent shall equal the amount, if any, by which the percentage specified in the foregoing subsection (a) of gross sales of Tenant during said quarter (or fraction thereof) exceeds _____ ($_____).

(c) Within thirty (30) days after the end of each calendar year (or fraction thereof) during the term hereof there shall be determined the aggregate gross sales of Tenant during said calendar year (or fraction thereof). If Tenant shall have paid to Landlord on account of subsection (b) above, an amount greater than Tenant is required to pay under the

terms of subsection (a) above, Landlord shall immediately pay such overage to Tenant.

(d) It is recognized that the beginning or the end of the term of this Lease may not correspond with the beginning or end of a calendar quarter or calendar year. The reporting and payment provisions hereof shall nevertheless apply to any such fractional calendar quarter or year; provided all percentage rentals shall be paid not later than thirty (30) days after the last day of the Lease term.

4.2 Gross Sales Defined. The term "gross sales" means all receipts from all sales from all businesses conducted upon or from the Premises by Tenant and all licensees, concessionaires and subtenants of the Tenant, whether such sales be evidenced by check, credit, charge account, exchange, or otherwise, and shall include, but not be limited to, the amounts received from the sale of goods, wares, and merchandise and for services performed on, at, or from the Premises, whether such orders be filled from the Premises or elsewhere, and whether such sales be made by means of merchandise-vending devices in the Premises. Each charge or sale upon installment or credit shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when Tenant shall receive payment. There shall be deducted from gross sales the sales price of merchandise returned by customers for exchange, provided that the sales price of such returned merchandise shall have previously been included in gross sales. Gross sales shall not include the amount of any sales, use, or gross sales tax imposed by any federal, state, municipal or governmental authority directly on sales and collected from customers, provided that the amount thereof is added to the selling price or absorbed therein, and paid by Tenant to such governmental authority. No franchise or capital stock tax and no income or similar tax based upon income or profits as such shall be deducted from gross sales in any event whatever.

4.3 Reports by Tenant. Tenant shall submit to Landlord on or before the fifteenth (15th) day of each calendar quarter during the term hereof, and on or before the fifteenth (15th) day following the last quarter (or fraction thereof) of the term of this Lease, at the place then fixed for the payment of rent, a written statement signed by Tenant and certified by it to be true and correct, showing in reasonable and accurate detail the amount of gross sales for the preceding calendar quarter or fractional quarter. Tenant shall submit to Landlord on or before the thirtieth (30th) day following the end of each calendar year (or fraction thereof) at the place then fixed for the payment of rent, a written statement signed by Tenant, or an officer thereof, and certified to be true and correct, showing accurately and in detail the amount of gross sales during the preceding calendar year (or fraction thereof). The statements shall be in such form and style and contain such details and breakdown as Landlord may reasonably require.

4.4 Tenant's Records. To ascertain the amount payable as rent, Tenant shall prepare and keep available on the Premises for a period of not less than two (2) years following the end of each calendar year or portion thereof throughout the term hereof, adequate books, records, and accounts which shall show inventories and receipts of merchandise at the Premises, and daily receipts from all sales and other transactions on or from the Premises by Tenant and any other persons conducting any business upon or from the Premises. Tenant shall record at the time of sale, in the presence of the customer, all receipts from sales or other transactions whether for cash or credit.

4.5 Audit. At its option, Landlord may cause, at any reasonable time, upon twenty-four (24) hours prior written notice, a complete audit to be made of Tenant's entire business affairs and records relating to the Premises for the period covered by any statement issued by the Tenant. Such audit shall be performed by an accountant of Landlord's choice. Tenant shall promptly remit any deficiency in percentage rentals established by such audit. In addition, if said audit shall disclose that actual gross sales exceed those reported by Tenant by two percent (2%) or more, Tenant shall also promptly pay the cost of the audit together with any resulting deficiency in percentage rents, and Landlord may, at its option, promptly terminate this Lease upon five (5) day's notice.

5. ADJUSTMENTS TO RENT

It is the intent of both parties that the minimum and percentage rentals herein specified shall be absolutely net to Landlord throughout the term of this Lease, that all costs, expenses, and obligations of every kind relating to the Premises which may arise or become due during the term hereof shall be paid by Tenant and that Landlord shall be indemnified by Tenant against such costs, expenses, and obligations. In furtherance thereof, Tenant shall pay as additional rent, without demand therefore and without setoff or deduction, its proportionate share of expenses and charges as set forth in Section 5.1 - 5.3 below. The "Proportionate Share" of Tenant shall be obtained by multiplying the expense in question by a fraction, the numerator of which shall be the square-foot area of the Premises and the denominator of which shall be the square-foot area of all space being used for commercial purposes in the Shopping Center.

5.1 Taxes.

(a) Tenant shall pay its Proportionate Share of all "Real Estate Taxes" levied or assessed by lawful taxing authorities against the land, building or improvements comprising the Shopping Center.

(b) "Real Estate Taxes" shall mean all taxes, assessments, levies, and charges, whether special, extraordinary, or otherwise, whether foreseen or unforeseen, which may be levied, assessed, or imposed upon, on account of or with respect to: (i) the ownership of and/or all other taxable interests in all land situated in the Shopping Center; (ii) all buildings, structures, and other improvements situated thereon; (iii) rents or rental income, whether such tax be levied on the Landlord or the Tenant.

(c) Tenant shall pay one-twelfth of its Proportionate Share of Real Estate Taxes each month in advance on the first day of each month with its payment of minimum monthly rental. The amount of Real Estate Taxes upon which such payment is based shall be the most current notice (s) of assessment or tax bill(s) concerning the entire Shopping Center or, if there are none, such amount as Landlord may reasonably estimate. Should the taxing authorities include in such Real Estate Taxes the value of any improvements made by Tenant, or include machinery, equipment, fixtures, inventory, or other personal property of Tenant, then Tenant shall also pay the entire Real Estate Taxes for such items. If the amount paid by Tenant toward Real Estate Taxes exceeds the actual amount due (as determined from the notice(s) of assessment or tax bill(s) actually covering the period in question), the excess shall be credited on Tenant's next succeeding payment (s) pursuant to this subsection. If the amount paid by Tenant is less than said actual amount due, Tenant shall pay to Landlord the deficiency within ten (10) days after notice from Landlord. A tax bill submitted by Landlord to Tenant shall be conclusive evidence of the amount of taxes assessed or levied, as well as the items taxed. Tenant at all times shall be responsible for and shall pay, before delinquency, all municipal, county, state, or federal taxes assessed against any leasehold interest or any personal property of any kind owned, installed, or used by Tenant.

(d) Tenant shall also be solely responsible for and shall pay before delinquency all minicipal, county, state, or federal taxes assessed during the term of this Lease against any personal property of any kind, owned by or placed in, upon, or around the Premises by Tenant.

5.2 Common Area Expenses

(a) Tenant shall pay to Landlord its Proportionate Share of the Shopping Center's operating cost. The "Shopping Center's operating cost" means the total cost and expense incurred in operating and maintaining the common areas, hereinafter defined, acutally used or available for use by Tenant and the employees, agents, servants, customers, and other invitees of Tenant, excluding only items of expense commonly known and designated as carrying charges, but specifically including, without limitation, utility expenses for lighting and operation of air conditioning and heating equipment, personal property taxes and assessments on the common area improvements and equipment; premiums on fire and extended insurance

coverage, vandalism insurance, boiler insurance, and plate-glass insurance for the common areas; maintenance, repair and replacement of common area pavement and mechanical equipment; repair, maintenance, and cleaning of the common area structure including floors, ceiling, roof, skylights, and windows; gardening and landscaping, repairs, line painting, lighting, sanitary control, removal of snow, trash, rubbish, garbage, and other refuse, depreciation on machinery and equipment used in such maintenance, the cost of personnel to implement such services, to direct parking, and to police the common areas, and ten (10%) percent of all the foregoing costs to cover administrative and overhead costs. "Common Areas" means all areas, space, equipment, and special services provided for the common or joint use and benefit of the lessees or occupants of the Shopping Center, or portions thereof, their employees, agents, servants, customers, and other invitees, including without limitation, parking areas, access roads, driveways, retaining walls, landscaped areas, truck serviceways or tunnels, loading docks, pedestrian malls, courts, stairs, ramps and sidewalks, comfort and first-aid stations, washrooms and parcel pick-up stations.

(b) Tenant's Proportionate Share of the Shopping Center's operating cost shall be computed on the basis of periods of twelve consecutive calendar months as designated by Landlord and estimated payments toward the same shall be made by Tenant in equal installments in advance on the first day of each calendar month in an amount to be established by the Landlord. Within sixty (60) days after the end of each twelve (12) month period Landlord shall furnish to Tenant a statement showing the Shopping Center's operating cost for the preceding period and any adjustments to be made as a result thereof. In the case of a deficiency, Tenant shall promptly remit the amount of such deficiency to Landlord. In the case of a surplus, Landlord shall apply said surplus to payments next falling due from Tenant under this subsection (b).

5.3 Insurance. Tenant shall pay its Proportionate Share of the cost of all insurance procured by Landlord pursuant to Section 20 hereof. Tenant shall pay said Proportionate Share monthly, in advance, at the same time and in the same manner as it pays minimum guaranteed rent. Landlord shall annually provide a statement of the amount of Tenant's Proportionate Share of such cost, which statement shall set forth the basis for such charge.

6. SECURITY DEPOSIT

6.1 Deposit. Tenant has deposited with Landlord the sum of Six hundred only---------- ($ 600.00) as security for the performance by Tenant of all of the terms, covenants, and conditions required to be performed by it hereunder. Such sum shall be returned to Tenant after the expiration of the term of this Lease and delivery of possession of the Premises to Landlord if, at such time, Tenant has performed all such terms, covenants, and conditions. Prior to the time when Tenant is entitled to the return of the security deposit, Landlord shall be entitled to intermingle such deposit with its own funds and to use such sum for such purposes as Landlord may determine. Tenant shall not be entitled to any interest on the security deposit.

6.2 Default. In the event of default by Tenant in respect of any of its obligations under this Lease, including, but not limited to, the payment of rent or additional rent, Landlord may use, apply, or retain all or any part of the security deposit for the payment of any unpaid rent or additional rent, or for any other amount which Landlord may be required to expend by reason of the default of Tenant, including any damages or deficiency in the reletting of the Premises, regardless of whether the accrual of such damages or deficiency occurs before or after an eviction or a portion of the security deposit is so used or applied, Tenant shall, upon five (5) days written demand, deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount. Tenant's failure to do so shall constitute a default under this Lease.

6.3 Sale of Shopping Center. In the event of an assignment of Landlord's interest in the Premises, Landlord shall have the right to transfer the security deposit to the assignee thereof and Landlord shall thereupon be released from all liability for the return of such deposit.

Tenant shall not assign or encumber for the money deposited as security, and neither Landlord nor its successors or assigns shall be bound by any such assignment or encumbrance.

7. CONSTRUCTION

7.1 Improvements. If the Premises and the building(s) containing the same are not currently in existence, Landlord shall, at its own cost and expense, construct and complete said building and certain improvements to Premises for Tenant's use, incorporating in such construction all applicable items of work described in Exhibit "B". In addition, Tenant, at its own cost and expense, shall construct and install its fixtures and equipment and shall perform the other work set forth on Exhibit "B", incorporating in such construction all applicable items of work described on Exhibit "B". Tenant shall have the right to enter the Premises and to obtain keys thereto to perform Tenant's work prior to the Commencement Date but after Landlord has given notice pursuant to Section 2.1; in doing so, however, Tenant shall comply with directions of the Landlord and shall not interfere with any of Landlord's construction activities. During such entry all of Tenant's obligations hereunder, except the obligation to pay rent, shall be in full force and effect. Any work other than or in addition to the items specifically enumerated as Landlord's work on Exhibit "B" shall be performed by Tenant at its own cost and expense. Landlord shall cause all of the construction which is to be performed by it to be completed, and the Premises ready for Tenant to install its fixtures and equipment and to perform the other work described on Exhibit "B", as soon as reasonably possible, but in no event later than twenty-three (23) months after the date of this Lease. In the event Landlord's construction obligation have not been fulfilled upon the expiration of said twenty-three (23) month period, Tenant shall have the right to exercise any right or remedy available to it under applicable law, including the right to terminate this Lease, except that under no circumstances shall Landlord be liable to Tenant for any incidental or consequential loss or damage to Tenant resulting from delay in construction.

7.2 Changes to Shopping Center. Landlord hereby reserves the right at any time to make changes, alterations or additions, including the building and leasing of additional commercial space, in or on the building in which the Premises are contained, anywhere in the Shopping Center. Tenant shall not, in such event, claim or be allowed any damages or right to terminate this Lease for injury or inconvenience occasioned thereby.

8. USE

Tenant shall use the Premises solely for the purpose of conducting its business, which is expressly limited to: Printing

Said business shall be operated under the tradename of:

Tenant shall not use or permit the Premises to be used for any other purpose or purposes except with the prior written consent of Landlord.

9. CONTINUOUS OPERATION

Tenant covenants to operate all of the Premises continuously during the entire term of this Lease with due diligence and efficiency so as to produce a maximum volume of gross sales, unless prevented from doing so by causes beyond Tenant's control. Subject to inability by reason of strikes or labor disputes, Tenant shall keep and maintain at all times within and upon the Premises a stock of merchandise of such size, character and quality as shall be reasonably designed to produce the maximum volume of gross sales and shall keep on the Premises at all times sufficient personnel to service the usual and ordinary demands and requirements of its customers. Tenant shall conduct its business on the Premises during the regular customary days and hours for such type of business in the city or trade At the end of each year, the tenant and landlord will jointly review the contract for renewal.

area in which the Shopping Center is located. Tenant shall install and maintain at all times displays of merchandise in the display windows (if any) of the Premises. Tenant shall keep the display windows and signs (f any) on the Premises well lighted during the hours from sundown to 10:00 o'clock P.M., unless prevented by causes beyond the control of Tenant. As liquidated damages for the failure of Tenant to comply with the terms of this Section, and in addition to all other remedies Landlord may have hereunder, Landlord shall have the right at its option to collect not only the minimum guaranteed rent herein provided, but additional rent at the rate of one-thirtieth (1/30th) of the minimum guaranteed rent herein provided for each and every day that Tenant shall fail to conduct its business as herein provided. Said additional rent shall be in lieu of any percentage rent that might have been earned during such period of Tenant's failure to conduct its business as herein provided.

10. LAWS, WASTE, NUISANCE

Tenant covenants that it: (a) will not use or suffer or permit any person or persons to use the Premises or any part thereof, or adjacent sidewalks, for conducting thereon a second-hand store or any auction, distress, fire, bankruptcy, or going-out-of-business sale; (b) will comply with all governmental laws, ordinances, regulations, and requirements, now in force or which hereafter may be in force, of any lawful governmental body or authorities having jurisdiction over the Premises; (c) will keep the Premises and every part thereof in a clean, neat, and orderly condition, free of objectionable noise, odors, or nuisances, and will in all respects and at all times fully comply with all health and police regulations; and (d) shall not suffer, permit, or commit any waste.

11. COMPETITION

Neither Tenant nor any affiliate or principal of Tenant shall directly or indirectly open, own, manage, or have any interest whatsoever in any similar or competing business within a radius of _____ _____(_____) miles from the outside boundary of the Shopping Center. In the event of a breach of this covenant and in addition to any remedy otherwise available, Landlord may require that all sales made from any such other business be included in the computation of the percentage rent as though such sales had actually been made from the Premises.

12. SIGNS, AWNINGS, AND CANOPIES

Tenant shall not place or suffer to be placed or maintained on any exterior door, wall, or window of the Premises, or elsewhere in the Shopping Center, any sign, awning, or canopy, or advertising matter or other thing of any kind, and will not place or maintain any decoration, lettering, or advertising matter on the glass of any window or door of the Premises without first obtaining Landlord's written approval. Tenant further agrees to maintain such sign, awning, canopy, decoration, lettering, advertising matter, or other things as may be approved in good condition and repair at all times. Landlord may, at Tenant's cost, remove any item erected in violation of this Section.

13. MAINTENANCE

13.1 Maintenance by Tenant. Tenant, at its sole cost and expense, shall at all times keep the Premises, including exterior entrances, all glass and show window moldings and sidewalks (whether included in the description of the Premises or adjoining the same) and all partitions, doors, fixtures, equipment, and appurtenances thereof, including lighting, heating and plumbing fixtures, sewage facilities, electric motors, and any air-conditioning system, in good order, condition, and repair, including the replacement thereof when necessary, and including reasonably periodic painting as determined by Landlord.

13.2 Maintenance by Landlord. Landlord shall maintain the structural components of the Shopping Center; provided, if Landlord is required to make structural repairs by reason of Tenant's negligent act or omissions, Tenant shall pay Landlord's costs for making such repairs plus twenty percent (20%) for overhead immediately upon presentation of a bill

therefor. Failure of Tenant to pay such amount immediately shall constitute a default by Tenant hereunder.

13.3 Landlord's Right to Cure. If Tenant refuses or neglects to repair property as required hereunder to the reasonable satisfaction of Landlord as soon as reasonably possible after written demand, Landlord may make such repairs without liability on its part to Tenant for any loss or damage that may accrue to Tenant's merchandise, fixtures, or other property or to Tenant's business by reason thereof, and upon completion thereof, Tenant shall pay Landlord's cost for making such repairs plus twenty percent (20%) for overhead, immediately upon presentation of a bill therefor. Failure of Tenant to pay such amount immediately shall constitute a default by Tenant hereunder.

14. ALTERATIONS

Except as set forth in Exhibit "B", Tenant shall not make or cause to be made any alterations, additions or improvements or install or cause to be installed any trade fixtures, exterior signs, floor coverings, interior or exterior lighting, plumbing fixtures, or shades or awnings, or make any changes to the store front, without first obtaining Landlord's written approval. Tenant shall present to the Landlord plans and specifications for such work at the time approval is sought. In the event Landlord consents to the making of any alterations, additions, or improvements to the Premises by Tenant, the same shall be made by Tenant at Tenant's sole cost and expense. All such work with respect to any alterations, additions, and changes shall be done in a good and workmanlike manner and diligently prosecuted to completion such that, except as absolutely necessary during the course of such work, the Premises shall at all times be a complete operating unit. Any such alterations, additions, or changes shall be performed and done strictly in accordance with all laws and ordinances relating thereto. In performing the work or any such alterations, additions, or changes, Tenant shall have the same performed in such a manner as not to obstruct access to any portion of the Shopping Center. Any alterations, additions, or improvements to or of the Premises, including, but not limited to, wall covering, paneling, and built-in cabinet work, but excepting movable furniture and trade fixtures, shall at once become a part of the realty and shall be surrendered with the Premises unless Landlord otherwise elects at the end of the term hereof.

15. MECHANIC'S LIEN

Should any mechanic's or other lien be filed against the Premises or any part thereof by reason of Tenant's acts or omissions or because of a claim against Tenant, Tenant shall cause the same to be cancelled and discharged of record by bond or otherwise within ten (10) days after notice by Landlord.

16. UTILITIES

Landlord shall not be liable in the event of any interruption in the supply of any utility services to the Premises or Shopping Center. Tenant agrees that it will not install any equipment which will exceed or overload the capacity of any utility facilities and that if any equipment installed by Tenant shall require additional utility facilities, the same shall be installed at Tenant's expense in accordance with plans and specifications to be approved in writing by Landlord. Tenant shall be solely responsible for and shall promptly pay all charges for use or consumption for heat, sewer, water, gas, electricity, or any other utility services. Should Landlord elect to supply any utility services, Tenant agrees to purchase and pay for the same as additional rent at the applicable rates charged by the utility company furnishing the same.

17. COMMON AREAS

All common areas in the Shopping Center which Tenant may be permitted to use and occupy are to be used and occupied under a revocable license, and if any such license be revoked or if the amount of such areas be changed or diminished, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent nor shall revocation or diminution of such areas be deemed construc-

tive or actual eviction. All common areas and other facilities in or about the Shopping Center shall be subject to the exclusive control and management of Landlord. Landlord shall have the right to construct, maintain, and operate lighting and other facilities on all said areas and improvements; to police the same; to change the area, level, location, and arrangement of parking areas and other facilities; to restrict parking by tenants, their officers, agents, and employees; to close all or any portion of said areas or facilities to such extent as may be legally sufficient to prevent a dedication thereof or the accrual of any right to any person or the public therein; and to close temporarily all or any portion of the parking areas or facilities to discourage non-customer parking. Landlord shall operate and maintain the common areas in such manner as Landlord in its discretion shall determine, shall have full right and authority to employ and discharge all personnel with respect thereto, and shall have the right, through reasonable rules, regulations, and/or restrictive covenants promulgated by it from time to time, to control use and operation of the common areas in order that the same may occur in a proper and orderly fashion.

18. ASSIGNMENT

18.1 Assignment Prohibited. Tenant shall not transfer, assign, mortgage, or hypothecate this Lease, in whole or in part, or permit the use of the Premises by any person or persons other than Tenant, or sublet the Premises, or any part thereof, without the prior written consent of Landlord in each instance. Such prohibition against assigning or subletting shall include any assignment or subletting by operation of law. Any transfer of this Lease from the Tenant by merger, consolidation, transfer of assets, or liquidation shall constitute an assignment for purposes of this Lease. In the event that Tenant hereunder is a corporation, an unincorporated association, or a partnership, the transfer, assignment, or hypothecation of any stock or interest in such corporation, association, or partnership in the aggregate in excess of forty-nine (49%) percent shall be deemed an assignment within the meaning of this Section.

18.2 Consent Required. Any assignment or subletting without Landlord's consent shall be void, and shall constitute a default hereunder which, at the option of Landlord, shall result in the termination of this Lease or exercise of Landlord's other remedies hereunder. Consent to any assignment or subletting shall not operate as a waiver of the necessity for consent to any subsequent assignment or subletting, and the terms of such consent shall be binding upon any person holding by, under, or through Tenant.

18.3 Landlord's Right in Event of Assignment. If this Lease is assigned or if the Premises or any portion thereof are sublet or occupied by any person other than the Tenant, Landlord may collect rent and other charges from such assignee or other party, and apply the amount collected to the rent and other charges reserved hereunder, but such collection shall not constitute consent or waiver of the necessity of consent to such assignment, subleasing, or other transfer, nor shall such collection constitute the recognition of such assignee, sublessee, or other party as the Tenant hereunder or a release of Tenant from the further performance of all of the covenants and obligations of Tenant herein contained. In the event that Landlord shall consent to a sublease or assignment hereunder, Tenant shall pay to Landlord reasonable fees, not to exceed $100.00, incurred in connection with processing of documents necessary to the giving of such consent.

19. INDEMNITY

(a) Tenant shall indemnify Landlord and save it harmless from and against any and all suits, actions, damages, claims, liability, and expense in connection with loss of life, bodily or personal injury, or property damage arising from or out of any occurrence in, upon, at or from the Premises, or the occupancy or use by Tenant of Premises or any part thereof, or occasioned wholly or in part by any act or omission of Tenant, its agents, contractors, employees, servants, invitees, licensees, or concessionaires, including acts or omissions relating to the sidewalks and common areas within the Shopping Center.

(b) Landlord shall not be responsible or liable at any

time for any loss or damage to Tenant's merchandise, equipment, fixtures, or other personal property or to Tenant's business, including any loss or damage to either the person or property of Tenant that may be occasioned by or through the acts or omissions of persons occupying adjacent, connecting, or adjoining space. Tenant shall store its property in and shall use and enjoy the Premises and all other portions of the Shopping Center at its own risk, and hereby releases Landlord, to the full extent permitted by law, from all claims of every kind resulting in loss of life, personal or bodily injury, or property damage.

(c) Tenant shall give prompt notice to Landlord in case of fire or accidents in the Premises or in the building of which the Premises are a part or of defects therein or in any fixtures or equipment.

(d) In case Landlord shall without fault on its part be made a party to any litigation commenced by or against Tenant, then Tenant shall protect and hold Landlord harmless and shall pay all costs, expenses, and reasonable attorneys' fee.

20. INSURANCE

20.1 Fire Insurance on Real Estate. Landlord, at the expense of Tenant as provided in Section 5.3, shall keep the buildings in and improvements to the Shopping Center insured in an amount equivalent to not less than 90% of the full insurable value thereof against: (a) loss or damage by fire; (b) all risks customarily covered under extended coverage endorsements; and (c) vandalism and malicious mischief. Landlord (and, at Landlord's option, the lender interested under any mortgage or similar instrument then affecting the Premises) shall be solely responsible for determining the amount of fire and extended coverage insurance and the specific endorsements to be maintained. Landlord may also maintain boiler insurance on all heating boilers within the Shopping Center in such amounts as it determines. Landlord shall be named as an insured on each such policy. The proceeds of such insurance in case of loss or damage shall be paid to Landlord to be applied on account of the obligation of Landlord to repair and/or rebuild the Premises pursuant to Section 21. Any proceeds not required for such purpose shall be the sole property of Landlord.

20.2 Fire Insurance on Tenant's Fixtures. At all times during the term hereof, Tenant shall keep in force at its sole cost and expense, fire insurance and extended coverage in companies acceptable to Landlord, equal to the replacement cost of Tenant's improvements, trade fixtures, furnishings, equipment, and contents upon the Premises, and naming Landlord as an insured.

20.3 Liability Insurance. Tenant shall, during the entire term hereof, keep in full force and effect a policy of public liability and property damage insurance with respect to the Premises, the business operated by Tenant, and any subtenants, concessionaires, or licensees of Tenant in the Premises, with limits of public liability coverage of not less than $250,000 per person and $500,000 per occurrence and with limits of property damage liability coverage of not less than $50,000 per accident or occurrence. The policy shall name Landlord, any person, firms, or corporations designated by Landlord, and Tenant as insured, and shall contain a clause that the insurer will not cancel or change the insurance without first giving Landlord ten (10) days written notice. The insurance shall be in an insurance company approved by Landlord and a copy of the policy or a certificate of insurance shall be delivered to Landlord. All public liability, property damage, and other liability policies shall be written as primary policies, not contributing with and not in excess of coverage which Landlord may carry. All such policies shall contain a provision that Landlord, although named as an insured, shall nevertheless be entitled to recover under said policies for any loss occasioned to it, its servants, agents, and employees by reason of the negligence of Tenant. All such insurance shall specifically insure the performance by Tenant of the indemnity agreement as to liability for injury to or death of persons or injury or damage to property contained in Section 19.

20.4 Subrogation. Tenant waives its right of subrogation against Landlord for any reason whatsoever, and any insurance policies herein required to be procured by Tenant shall contain an express waiver of any right of subrogation by the insurer against Landlord.

20.5 Lender. Any mortgage lender interested in any part of the Shopping Center may, at Landlord's option, be afforded coverage under any policy required to be secured by Landlord or Tenant hereunder, by use of a mortgagee's endorsement to the policy concerned.

20.6 Increase in Insurance Premiums. Tenant shall not stock, use, or sell any article or do anything in or about the Premises which may be prohibited by Landlord's insurance policies or any endorsements or forms attached thereto, or which will increase any insurance rates and premiums on the Premises, the building of which they are a part, or any other buildings in the Shopping Center. Tenant shall pay on demand any increase in premiums for Landlord's insurance that may be charged on such insurance carried by Landlord resulting from Tenant's use and occupancy of the Premises or the Shopping Center, whether or not Landlord has consented to the same.

21. DESTRUCTION

If the Premises shall be partially damaged by any casualty insured against under Landlord's insurance policy, Landlord shall, upon receipt of the insurance proceeds, repair the Premises and until repair is complete the minimum rent shall be abated proportionately as to that portion of the Premises rendered untenantable. Notwithstanding the foregoing, if: (a) the Premises by reason of such occurrence are rendered wholly untenantable, or (b) the Premises should be damaged as a result of a risk which is not covered by Landlord's insurance, or (c) the Premises should be damaged in whole or in part during the last three (3) years of the term or of any renewal hereof, or (d) the Premises or the building of which it is a part, whether the Premises are damaged or not, or all of the buildings which then comprise the Shopping Center, should be damaged to the extent of fifty (50%) percent or more of the then-monetary value thereof, or (3) any or all of the buildings or common areas of the Shopping Center are damaged, whether or not the Premises are damaged, to such an extent that the Shopping Center cannot in the sole judgment of Landlord be operated as in integral unit, then and in any such events, Landlord may either elect to repair the damage or may cancel this Lease by notice of cancellation within one hundred eighty (180) days after such event and thereupon this Lease shall expire, and Tenant shall vacate and surrender the Premises to Landlord. Tenant's liability for rent upon the termination of this Lease shall cease as of the day following Landlord's giving notice of cancellation. In the event Landlord elects to repair any damage, any abatement of rent shall end five (5) days after notice by Landlord to Tenant that the Premises have been repaired. Nothing in this Section shall be construed to abate percentage rent, but the computation of such rent shall be based upon the revised minimum rent as the same may be abated. If the damage is caused by the negligence of Tenant or its employees, agents, invitees, or concessionaires, there shall be no abatement of rent. Unless this Lease is terminated by Landlord, Tenant shall repair and re-fixture the interior of the Premises in a manner and in at least a condition equal to that existing prior to the destruction or casualty and the proceeds of all insurance carried by Tenant on its property and fixtures shall be held in trust by Tenant for the purpose of said repair and replacement.

22. CONDEMNATION

22.1 Total Condemnation. If the whole of the Premises shall be acquired or taken by condemnation proceeding, then this Lease shall cease and terminate as of the date of title vesting in such proceeding.

22.2 Partial Condemnation. If any part of the Premises shall be taken as aforesaid, and such partial taking shall render that portion not so taken unsuitable for the business of Tenant (except for the amount of floor space), then this Lease shall cease and terminate as aforesaid. If such partial taking is not extensive enough to render the Premises unsuitable for the business of Tenant, then this Lease shall continue in effect except that the minimum rent shall be reduced in the same proportion

that the floor area of the Premises (including basement, if any) taken bears to the original floor area demised and Landlord shall, upon receipt of the award in condemnation, make all necessary repair or alterations to the building in which the Premises are located so as to constitute the portion of the building not taken a complete architectural unit, but such work shall not exceed the scope of the work to be done by Landlord in originally constructing said building, nor shall Landlord in any event be required to expend for such work an amount in excess of the amount received by Landlord as damages for the part of the Premises so taken. "Amount received by Landlord" shall mean that part of the award in condemnation which is free and clear to Landlord of any collection by mortgage lenders for the value of the diminished fee.

22.3 Landlord's Option to Terminate. If more than twenty percent (20%) of the floor area of the building in which the Premises are located shall be taken as aforesaid, Landlord may, by written notice to Tenant, terminate this Lease. If this Lease is terminated as provided in this subsection, rent shall be paid up to the day that possession is so taken by public authority and Landlord shall make an equitable refund of any rent paid by Tenant in advance.

22.4 Award. Tenant shall not be entitled to and expressly waives all claim to any condemnation award for any taking, whether whole or partial and whether for diminution in value of the leasehold or to the fee, although Tenant shall have the right, to the extent that the same shall not reduce Landlord's award, to claim from the condemnor, but not from the Landlord, such compensation as may be recoverable by Tenant in its own right for damages to Tenant's business and fixtures.

22.5 Definition. As used in this Section the term "condemnation proceeding" means any action or proceeding in which any interest in the Premises is taken for any public or quasi-public purpose by any lawful authority through exercise of the power of eminent domain or right of condemnation or by purchase or otherwise in lieu thereof.

23. EVENTS OF DEFAULT; REMEDIES

23.1 Default by Tenant. Upon the occurrence of any of the following events, Landlord shall have the remedies set forth in Section 23.2:

(a) Tenant fails to pay any rental or any other sum due hereunder within ten (10) days after the same shall be due.

(b) Tenant fails to perform any other term, condition, or covenant to be performed by it pursuant to this Lease within thirty (30) days after written notice of such default shall have been given to Tenant by Landlord.

(c) Tenant or its agent shall falsify any report required to be furnished to Landlord hereunder.

(d) Tenant or any guarantor of this Lease shall became bankrupt or insolvent or file any debtor proceedings or have taken against such party in any court pursuant to state or federal statute, a petition in bankruptcy or insolvency, reorganization, or appointment of a receiver or trustee; or Tenant petitions for or enters into an arrangement; or suffers this Lease to be taken under a writ of execution.

(e) Tenant violates either Section 8 or Section 18.

23.2 Remedies. Upon the occurrence of the events set forth in Section 23.1, Landlord shall have the option to take any or all of the following actions, without further notice or demand of any kind to Tenant or any other person:

(a) Immediately reenter and remove all persons and property from the Premises, storing said property in a public place, warehouse, or elsewhere at the cost of, and for the account of, Tenant, all without service of notice or resort to legal process and without being deemed guilty of or liable in

trespass. No such reentry or taking possession of the Premises by Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of such intention is given by Landlord to Tenant. No such action by Landlord shall be considered or construed to be a forcible entry.

(b) Collect by suit or otherwise each installment of rent or other sum as it becomes due hereunder, or enforce, by suit or otherwise, any other term or provision hereof on the part of Tenant required to be kept or performed.

(c) Terminate this Lease by written notice to Tenant. In the event of such termination, Tenant agrees to immediately surrender possession of the Premises. Should Landlord terminate this Lease, it may recover from Tenant all damages it may incur by reason of Tenant's breach, including the cost of recovering the Premises, reasonable attorney's fees, and the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the stated term over the then-reasonable rental value of the Premises for the remainder of the stated term, all of which amounts shall be immediately due and payable from Tenant to Landlord. In determining the rent which would be payable by Tenant hereunder subsequent to default, the rent for each year of the unexpired term shall be equal to the average minimum, percentage and additional rents paid by Tenant from the Commencement Date to the time of default, or during the preceding three (3) full calendar years, whichever period is shorter.

(d) Should Landlord reenter, as provided above, or should it take possession pursuant to legal proceedings or pursuant to legal proceedings or pursuant to any notice provided for by Law, and whether or not it terminates this Lease, it may be necessary in order to relet the Premises, and relet the same or any part thereof for such term or terms (which may be for a term extending beyond the term of this Lease) and at such rental or rentals and upon such other terms and conditions as Landlord in its sole discretion may deem advisable. Upon each such reletting all rentals received by the Landlord from such reletting shall be applied, first, to the payment of any indebtedness other than rent due hereunder from Tenant to Landlord; second, to the payment of any costs and expenses of such reletting, including brokerage fees and attorney's fees and costs of any alterations and repairs; third, to the payment of rent due and unpaid hereunder, and the residue, if any, shall be held by Landlord and applied in payment of future rent as the same may become due and payable hereunder. If such rentals received from such reletting during any month be less than that to be paid during such month by Tenant hereunder, Tenant shall pay any such deficiency to Landlord. Such deficiency shall be calculated and paid monthly. No such reentry and reletting of the Premises by Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of such intention be given to Tenant pursuant to subsection (c) above, or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach.

The remedies given to Landlord in this Section 23 shall be in addition and supplemental to all other rights or remedies which Landlord may have under laws then in force.

24. ACCESS TO PREMISES

Landlord shall have the right to place, maintain, and repair all utility equipment of any kind in, upon, and under the Premises as may be necessary for the servicing of the Premises and other portions of the Shopping Center. Landlord shall also have the right to enter the Premises at all times to inspect or to exhibit the same to prospective purchasers, mort-

gagees, tenants, and lessees, and to make such repairs, additions, alterations, or improvements as Landlord may deem desirable. Landlord shall be allowed to take all material upon said Premises that may be required therefor without the same constituting an actual or constructive eviction of Tenant in whole or in part and the rents reserved herein shall in no wise abate while said work is in progress by reason of loss or interruption of Tenant's business or otherwise, and Tenant shall have no claim for damages. During the six (6) months prior to expiration of this Lease or of any renewal term, Landlord may place upon the Premises "To Let" or "For Sale" signs which Tenant shall permit to remain thereon.

25. CONTRACTOR

With respect to each of Landlord's obligations under any provision of this Lease concerning creation or reconstruction of the Premises, the building containing the same, or other improvements in the Shopping Center, the obligation concerned shall be fulfilled either: (i) By Landlord's arranging to have construction accomplished by one or more contractors licensed in the State in which the Shopping Center is located (any of which contractors may, at Landlord's option, be a corporation or other entity directly or indirectly affiliated with or controlled by Landlord); and/or, at Landlord's option (ii) If at the time Landlord is required to fulfill such obligation it is the holder of a license authorizing it to act as a contractor within such State, by Landlord's participating in creation or reconstruction of the improvements concerned in the capacity of contractor. Any construction or building permits required for creation or reconstruction of the Premises, the building containing the same, or other improvements in the Shopping Center shall be obtained by Landlord's contractor(s) or, if Landlord acts as such, by Landlord itself.

26. FINANCING

26.1 Subordination. Upon request of Landlord, Tenant will subordinate its rights hereunder to the lien of any mortgage or mortgages, or lien or other security interest resulting from any other method of financing or refinancing, now or hereafter in force against the land and/or buildings hereafter placed upon the land of which the Premises are a part and to all advances made or thereafter to be made upon the security thereof. The provisions of this Section notwithstanding, so long as Tenant is not in default hereunder, this Lease shall remain in full force and effect for the full term hereof and shall not be terminated as a result of any foreclosure or sale or transfer in lieu of such proceedings pursuant to a mortgage or other instrument to which Tenant has subordinated its rights pursuant hereto.

26.2 Amendment. Tenant agrees that from time to time it shall, if so requested by Landlord and if doing so will not substantially and adversely affect Tenant's economic interests under this Lease, join with Landlord in amending the terms of this Lease so as to meet the reasonable needs or requirements of any lender which is considering furnishing or which has furnished any of the financing referred to in Section 26.1 above.

27. ATTORNMENT

In the event of the sale or assignment of Landlord's interest in the building of which the Premises are a part, or in the event of any proceedings brought for the foreclosure of, or in the event of exercise of the power of sale under, any mortgage or other security instrument made by Landlord covering the Premises, Tenant shall attorn to the assignee or purchaser and recognize such purchaser as Landlord under this Lease.

28. RIGHT TO CURE

In the event of breach, default, or noncompliance hereunder by Landlord, Tenant shall, before exercising any right or remedy available to it, give Landlord written notice of the claimed breach, default, or noncompliance. If prior to its giving such notice Tenant has been notified in writing (by way of Notice of Assignment of Rents and Leases, or otherwise) of the address of a lender which has furnished any of the financing referred to in Section 26.1 hereof, concurrently with giving the aforesaid notice to Landlord, Tenant shall, by registered mail, transmit a copy thereof to such lender. For the thirty (30) days following the giving of the notice(s)

required by the foregoing portion of this Section (or such longer period of time as may be reasonably required to cure a matter which, due to its nature, cannot reasonably be rectified within thirty (30) days), Landlord shall have the right to cure the breach, default, or noncompliance involved. If Landlord has failed to cure a default within said period, any such lender shall have an additional thirty (30) days within which to cure the same or, if such default cannot be cured within that period, such additional time as may be necessary if within such thirty (30) day period said lender has commenced and is diligently pursuing the actions or remedies necessary to cure the breach, default, or noncompliance involved (including, but not limited to, commencement and prosecution of proceedings to foreclose or otherwise exercise its rights under its mortgage or other security instrument, if necessary to effect such cure), in which event this Lease shall not be terminated by Tenant so long as such actions or remedies are being diligently pursued by said lender.

29. QUIET ENJOYMENT

Tenant, upon paying the rents and observing and performing all of the terms, covenants, and conditions on its part to be performed hereunder, shall peaceably and quietly enjoy the Premises for the term hereof.

30. SURRENDER OF PREMISES

At the expiration of this Lease, Tenant shall surrender the Premises in the same condition as they were in upon delivery of possession thereto under this Lease, reasonable wear and tear excepted, and shall deliver all keys to Landlord. Before surrendering the Premises, Tenant shall remove all of its Personal Property and trade fixtures and such property or the removal thereof. If Tenant fails to remove its personal property and fixtures upon the expiration of this Lease, the same shall be deemed abandoned and shall become the property of Landlord.

31. HOLDING OVER

Any holding over after the expiration of the term hereof or of any renewal term shall be construed to be a tenancy from month to month at double the rents herein specified (prorated on a monthly basis) and shall otherwise be on the terms herein specified so far as possible.

32. ATTORNEYS' FEES

In the event that at any time during the term of this Lease either Landlord or the Tenant institutes any action or proceeding against the other relating to the provisions of this Lease or any default hereunder, then the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expenses of such action including reasonable attorneys' fees, incurred therein by the successful party, such fees not to exceed $2,500.

33. PAST DUE SUMS

If Tenant fails to pay, when the same is due and payable, any rent, additional rent, or other sum required to be paid by it hereunder, such unpaid amounts shall bear interest from the due date thereof to the date of payment at the rate of ten percent (10%) per annum. In addition thereto, Landlord may charge a sum of 2% of such unpaid amounts as a service fee. Notwithstanding the foregoing, however, Landlord's right concerning such interest and service fee shall be limited by the maximum amount which may properly be charged by Landlord for such purposes under applicable law.

34. MISCELLANEOUS PROVISIONS

34.1 No Partnership. Landlord does not by this Lease, in any way or for any purpose, become a partner or joint venturer of Tenant in the conduct of its business or otherwise. The provisions of this Lease relating to percentage rent are included solely for the purpose of providing a method whereby rent is to be measured and ascertained.

34.2 Force Majeure. Landlord shall be excused for the period of any delay in the performance of any obligations hereunder when prevented from so doing by cause or causes beyond Landlord's control, including labor disputes, civil commotion, war, governmental regulations or controls, fire or other casualty, inability to obtain any material or services, or acts of God.

34.3 No Waiver. Failure of Landlord to insist upon the strict performance of any provision or to exercise any option hereunder shall not be deemed a waiver of such breach. No provision of this Lease shall be deemed to have been waived unless such waiver be in writing signed by Landlord.

34.4 Notices. Any notice, demand, request, or other instrument which may be or is required to be given under this Lease shall be delivered in person or sent by United States certified or registered mail, postage prepaid, and shall be addressed (a) if to Landlord, at the place specified for payment of rent, and (b) if to Tenant, either at the Premises or at any other current address for Tenant which is know to Landlord. Either party may designate such other address as shall be given by written notice.

To Landlord:	To Tenant:
McMullin & Company	
4460 South Highland Drive, Suite 431	
Salt Lake City, Utah 84124	

34.5 Recording. Tenant shall not record this Lease or a memorandum thereof without the written consent of Landlord. Landlord, at its option and at any time, may file this Lease for record with the Recorder of the County in which the Shopping Center is located.

34.6 Partial Invalidity. If any provision of this Lease or the application thereof to any person or circumstance shall to any extent be invalid, the remainder of this Lease or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby and each provision of this Lease shall be valid and enforced to the fullest extent permitted by law.

34.7 Broker's Commissions. Tenant represents and warrants that there are no claims for brokerage commissions or finder's fees in connection with this Lease and agrees to indemnify Landlord against and hold it harmless from all liabilities arising from such claim, including any attorneys' fees connected therewith.

34.8 Tenant Defined: Use of Pronouns. The word "Tenant" shall be deemed and taken to mean each and every person or party executing this document as a Tenant herein. If there is more than one Tenant, any notice required or permitted by the terms of this Lease may be given by or to any one thereof, and shall have the same force and effect as if given by or to all thereof. The use of the neuter singular pronoun to refer to Landlord or Tenant shall be deemed a proper reference even though Landlord or Tenant may be an individual, a partnership, a corporation, or a group of two or more individuals or corporations. The necessary grammatical changes required to make the provisions of this Lease apply in the plural sense where there is more than one Landlord or Tenant and to corporations, associations, partnerships, or individuals, males or females, shall in all instances be assumed as though in each case fully expressed.

34.9 Provisions Binding, Etc. Except as otherwise provided, all provisions herein shall be binding upon and shall inure to the benefit of the parties, their legal representative, heirs, successors, and assigns. Each provision to be performed by Tenant shall be construed to be both a covenant and a condition, and if there shall be more than one Tenant, they shall all be bound, jointly and severally, by such provisions. In the event of any sale or assignment (except for purposes of security or

collateral) by Landlord of the Shopping Center, the Premises, or this Lease, Landlord shall, from and after the Commencement Date (irrespective of when such sale or assignment occurs), be entirely relieved of all of its obligations shall, as of the time of such sale or assignment or on the Commencement Date, whichever is later, automatically pass to Landlord's successor in interest.

34.10 Entire Agreement, Etc. This Lease and the Exhibits, Riders, and/or Addenda, if any, attached hereto, set forth the entire agreement between the parties. All Exhibits, Riders, or Addenda mentioned in this Lease are incorporated herein by reference. Any guaranty attached hereto is an integral part of this Lease and constitutes consideration given to Landlord to enter into this Lease. Any prior conversations or writings are merged herein and extinguished. No subsequent amendment to this Lease shall be binding upon Landlord or Tenant unless reduced to writing and signed. Submission of this Lease for examination does not constitute an option for the Premises and becomes effective as a lease only upon execution and delivery thereof by Landlord to Tenant. If any provision contained in a Rider or Addenda is inconsistent with a provision in the body of this Lease, the provision contained in said Rider or Addenda shall control. It is hereby agreed that this Lease contains no restrictive covenants or exclusives in favor of Tenant. The captions and Section numbers appearing herein are inserted only as a matter of convenience and are not intended to define, limit, construe, or describe the scope or intent of any Section or Paragraph.

34.11 Recourse by Tenant. Anything in this Lease to the contrary notwithstanding, Tenant agrees that it shall look solely to the estate and property of Landlord in the land and buildings comprising the Shopping Center, and subject to prior rights of any mortgagee of the Shopping Center or any part thereof, for the collection of any judgment (or other judicial process) requiring the payment of money by Landlord in the event of any default or breach by Landlord with respect to any of the terms, covenants, and conditions of this Lease to be observed and/or performed by Landlord, and no other assets of Landlord shall be subject to levy, execution, or other procedures for the satisfaction of Tenant's remedies.

34.12 Definition of Price Index. For purposes hereof, "Consumer Price Index" or "Price Index" shall mean the average for "All items" shown on the "U.S. City average for urban wage earners and clerical workers (including single workers), All items, groups, subgroups, and special groups of items" as promulgated by the Bureau of Labor Statistics of the U.S. Department of Labor.

35. MERCHANTS ASSOCIATION

In the event that Landlord elects to form a Merchants Association for the purpose of furthering the business interests of the Shopping Center as a whole, Tenant agrees to (a) become a member of said Association not later than thirty (30) days prior to the date on which the minimum annual rent commences to accrue hereunder; (b) to participate actively in and remain in good standing in said Association throughout the term of this lease; (c) cooperate with said Association and comply with its Articles and By-Laws; (d) pay to the Association, within twenty (20) days after being billed therefor by the Association, an initial assessment in an amount equal to the product of the number of square feet of floor area within the premises times ten cents (10¢), to be used by the Association for the purpose of defraying the promotional and public relations expenses incurred and to be incurred by the Association in connection with the opening of stores in the Shopping Center; (e) pay dues to the Association, in addition to said initial assessment, in the amounts fixed from time to time by the Board of Directors of the Association on a budgetary basis in order to carry out the purposes and defray the expenses of the Association, but in no event shall Tenant pay unto the Association, as minimum annual dues, less than an amount equal to the product of the number of square feet of floor area in the premises times fifteen cents (15¢), or one hundred and twenty ($120) per year, whichever is greater. Said annual dues shall be payable in equal monthly installments, in advance, on the first day of each calendar month during the term of this lease and shall be prorated for any fractional month. The provisions of this Paragraph 35 shall be deemed to be covenants for the benefit of Landlord and the Association and shall be enforceable by each of them.

The minimum annual [illegible] as defined in (e) above will be [illegible] percentage equal to the percentage increase or decrease from the [illegible] period of the United States Department of Labor, Bureau of Labor Statistics, Revised Consumer Price Index for Urban Wage Earners and Clerical Workers (1967 = 100). The Index published for the calendar year 1974 shall be considered the "base period". Such adjustment shall be made at any time there exists an increase or decrease of ten percent (10%) or more from the base period, and shall be effective for the fiscal year of the Merchants Association immediately following such adjustment. If at any time there shall not exist the Consumer Price Index, the Landlord may substitute any official index published by the Bureau of Labor Statistics, or successor, or similar governmental agency, as may then be in existence and shall be most nearly equivalent thereto.

The provisions of this lease shall prevail over any conflicting provisions which may be contained in the Articles, By-Laws, or Regulations of the Merchants Association.

36. RIDER

A Rider consisting of _____ pages, with Sections numbered consecutively, _____ through _____, is attached hereto and made a part hereof.

37. AUTHORITY OF SIGNATORIES

Each person executing this Lease individually and personally represents and warrants that he is duly authorized to execute and deliver the same on behalf of the entity for which he is signing (whether it be a corporation, general or limited partnership, or otherwise, and that this Lease is binding upon said entity in accordance with its terms.

GUARANTEE:

FOR VALUE RECEIVED, the undersigned hereby unconditionally guarantees the prompt and faithful execution and performance by Tenant of all of the obligations of Tenant set forth within this Lease Agreement and any modifications of said Agreement..

DATED THIS April 1st day of _____, 19[illegible].

_____ _____

_____

IN WITNESS WHEREOF, the parties hereto have executed this Lease on the date set forth above.

"Landlord"

WITNESS: Mc Millin & Company

_____ By _____

"Tenant"

WITNESS: _____

_____ By _____
Tom W. Ostler, Individually

Its _____

By _____
Niel W. Ostler, Individually

Its

WITNESS:

_____

By _____
Lee H. Ostler, Individually

Its _____

By _____
Paul F. Ostler, Individually

Its _____

By _____
John A. Vandermyde, Individually

Its _____

By _____
Delbert Christensen, Individually

Its _____

ESTOPPEL CERTIFICATE

RE: LEASE DATED: April 1, 1987 AMENDED _____

LANDLORD: McMullin & Company
Address: 4460 Highland Drive, Suite 431 S.L.C. Utah 84124

TENANT: Design Label Manufacturing

PREMISES: 7896 South 1530 West West Jordan, Utah 84084

As tenant under the above referenced lease, the undersigned hereby acknowledges for the benefit of the Buyer Roy S. Ludlow _____ that:

1. Tenant has accepted, is satisfied with, and is in full possession of said premises, including all improvements, additions and alterations thereto required to be made by Landlord under the said Lease.

2. Tenant is paying the full rent stipulated in said Lease with no offsets, defenses or claims.

3. Landlord has not been and is not presently in default under any of the terms, covenants or provisions of said Lease.

4. Landlord has satisfactorily complied with all of the requirements and conditions precedent to the commencement of the term of said Lease as specified in said Lease.

5. The fixed annual rent under said Lease is 7200 per and no monies have been paid to Landlord in advance of due date set forth in the Lease described above, except the following $600.00 Security Deposit One payment made 1st of May 87

6. The commencement date of said Lease is April 1, 1987; Tenant has been in occupancy and paying rent since April 1, 1987.

7. Tenant hereby acknowledges (a) that there have been no modifications or amendments to said Lease other than herein specifically stated.

DATED: 14 May 1987

TENANT: Design Label Mfg

BY: Delbert L. Christensen

SIGNATURE: Delbert L. Christensen

Thomas W Estler

Thomas W. Estler

Tenant's address to which notices are to be sent if other than Leased Premises:

_____
NAME

_____
STREET ADDRESS

EXHIBIT H

KENNETH M. HISATAKE #1505
Attorney for Defendants Lee Ostler, Paul Ostler, Christensen, and Custom Design Label Manufacturing
1825 South Seventh East
Salt Lake City, Utah 84105
Telephone: (801) 486-3541

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROY S. LUDLOW INVESTMENT COMPANY, Plaintiff, vs. THOMAS W. OSTLER, NEIL W. OSTLER, LEE H. OSTLER, PAUL F. OSTLER, JOHN A. VANDERMYDE, DELBERT CHRISTENSEN, individually and all doing business as DESIGN LABEL MANUFACTURING, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 890903593CV (Judge Frank G. Noel)

THIS MATTER came before the Court for trial, as scheduled, on the 14th day of November, 1991, at the hour of 10:00 o'clock A.M. before Judge Frank G. Noel, District Court Judge, sitting without a jury. The Plaintiff was represented by Randy S. Ludlow. The Defendants, Custom Design Label Manufacturing, Paul F. Ostler, Lee H. Ostler, and Delbert Christensen were represented by Kenneth M. Hisatake. The Defendants, Thomas W. Ostler, Neil W. Ostler, and John A. Vandermyde, were represented by John B. Anderson.

Prior to the presentation of testimony and submission of evidence, Plaintiff moved for the default of the Defendant, John

A. Vandermyde, for failing to submit a formal answer to Plaintiff's complaint. The Defendant Vandermyde acknowledged that no formal answer was submitted by him in response to Plaintiff's complaint. However, the Defendant Vandermyde had actively defended against Plaintiff's complaint and submitted Answers to Interrogatories and responded to Request for Admissions and had been represented throughout the development of the case by John B. Anderson. The Plaintiff had not moved for default nor requested the entry of default prior to this date. Counsel for Plaintiff stated the reason for the belated motion for default was that he was not aware of Defendant Vandermyde's failure to answer until the evening prior to the trial. The Court denied Plaintiff Motion for Default and granted Defendant Vandermyde's Motion to Adopt as his answer to Plaintiff's complaint, answers which had been submitted by the other Defendants.

Roy S. Ludlow, President of Ludlow Investment Company, appeared and testified in behalf of the Plaintiff. Bruce Richard McMullin was called by the Plaintiff as witness to testify in Plaintiff's behalf. Defendants, Delbert Christensen, Paul Ostler, Thomas Ostler, and Neil Ostler, testified in behalf of the Defendants.

The Court, having heard the testimony of the parties and their witnesses and having reviewed the evidence submitted by the parties, the Court now makes the following Findings of Fact:

FINDINGS OF FACT

1. The Plaintiff, Roy S. Ludlow Investment Company, is the successor in interest to the leased premises which is the subject matter of this suit and which was originally owned by Bruce Richard McMullin dba McMullin & Company.

2. The lease agreement, upon which this action is based, was provided by and prepared by Plaintiff's predecessor, Bruce Richard McMullin, who was the owner of the premises in question and the original landlord when the Defendants leased the premises. Mr. McMullin was solely responsible for the provisions and verbiage contained in the lease agreement.

3. Paragraphs 2.1 and 2.2 of the lease agreement provide that the lease is for a duration of three (3) years commencing April 1, 1987, and continuing to May 1, 1990.

4. The last sentence of paragraph 9, page 6, of the lease agreement contains the following verbiage: "At the end of each year the tenant and landlord will jointly review the contract for renewal."

5. Mr. McMullin was the sole author of the sentence contained in paragraph 9, page 6, which he admits was inserted by typewriting when the Defendants requested Mr. McMullin insert such a provision in the lease before the Defendants signed the lease agreement.

6. Mr. McMullin inserted the verbiage in question located in paragraph 9, page 6, and returned the lease agreement

to the Defendants, Based upon the sentence inserted at paragraph 9, page, 6, all of the Defendants signed the lease agreement.

7. Throughout Mr. McMullin's initial direct testimony and throughout the initial cross examination, Mr. McMullin testified he could not specifically recall why the sentence in paragraph 9, page 6, was inserted where it was located in the lease nor could he recall why the specific wording was used.

8. Mr. McMullin originally testified that, notwithstanding his inability to recall the specifics relating to the placement of the questioned verbiage, and his inability to recall why the specific verbiage or language was used by him, his belief was that the sentence pertaining to the annual review of the contract for renewal referred only to the review of the common area maintenance (CAM) costs.

9. Mr. McMullin admitted that he could not recall why the inserted sentence at paragraph 9, page 6, referred to a review of the contract for renewal rather than to a review of the common area maintenance costs for renewal.

10. The Defendant, Delbert Christensen, was one of three (3) Defendants who met with Mr. McMullin when the original lease agreement was presented to the Defendants for signing.

11. Mr. Christensen and others refused to sign the lease agreement in its original form and requested Mr. McMullin insert verbiage which would permit the Defendants to re-negotiate the terms of the lease after each year and, if necessary, permit the

Defendants to terminate the lease if the Defendants could not continue to pay the rental payments and other payments required by provisions of the lease.

12. The lease document was returned to Mr. McMullin by Defendants, unsigned. Mr. McMullin subsequently presented the lease agreement to the Defendants a few days later with the sentence inserted by typewriter in paragraph 9, page 6, of the lease agreement.

13. The Defendants, and each of them, thereafter signed the lease agreement.

14. The Defendants, Paul Ostler, Thomas Ostler, and Neil Ostler all testified that it was their understanding, after discussions among the Defendants prior to the signing of the agreement, that the inserted sentence in paragraph 9, page 6, required the landlord and the tenant to meet each year to review the provisions of the lease and particularly the rental sum of the lease to determine if Design Label Manufacturing had sufficient revenue to continue on with the lease for an additional year.

15. At the end of the one year tenancy, which the Defendants fully performed pursuant to the provisions of the lease, the Defendants, Paul Ostler and Lee Ostler, requested a meeting and did meet with the Plaintiff's President, Roy S. Ludlow, at Mr. Ludlow's office to discuss and review the lease agreement for possible renewal.

16. Roy S. Ludlow admitted that he refused to negotiate the provisions of the lease and informed the Defendants that he would not review for renewal the provisions of the lease and that the lease would stand as it was.

17. Based upon Mr. Ludlow's refusal to review the lease for renewal, Defendants notified Mr. Ludlow by certified mail prior to vacating the premises that they were vacating the premises at the end of the one year tenancy because of Plaintiff's refusal to review the provisions of the lease for renewal.

18. Prior to the trial of this case, Plaintiff submitted a Motion In Limine seeking to exclude parol evidence to explain the conflicting provisions of paragraph 2 and paragraph 9 of the lease agrement.

19. Plaintiff contended that the lease clearly expressed that the duration of the lease was three (3) years without condition or modifications.

20. Defendants responded to Plaintiff's Motion In Limine by Memorandum.

21. The Court ruled, prior to the trial, that the provisions of the lease relating to the duration of the lease were ambiguous and parol evidence must be taken to explain the apparent conflicting language contained in paragraph 2 of the lease agreement when read in conjunction with the last sentence of paragraph 9 of the lease agreement.

22. On direct testimony, the only persons who testified as to their intent and understanding of the conflicting verbiage were the four (4) Defendants who testified.

23. Mr. McMullin's rebuttal testimony to the effect that the inserted sentence was intended by him to permit a review of the lease agreement for renewal at the end of the first year only if the Defendants' business went into bankruptcy was vague.

24. The sentence inserted in paragraph 9, page 6, if construed as pertaining only to paragraph 9, is inconsistent with the verbiage of paragraph 9.

25. The inserted sentence is also not reconcilable with Plaintiff's earlier contention and with Mr. McMullin's earlier testimony that the sentence referred only to a review of the common area maintenance (CAM) costs.

26. The meaning of the inserted sentence would have to be strained before the Court could find that the words, "review the contract for renewal at the end of each year" meant that the contract would be reviewed only if the Defendants' business was bankrupt.

27. The Court finds that the inserted verbiage in paragraph 9, page 6, is more easily reconcilable with Defendants' position that the tenant and landlord would jointly review the contract at the end of each year for possible renewal, such renewal to be dependent in large part upon the success of the Defendants' business and its ability to continue to pay the stated lease

payments, common area maintenance payments, taxes, insurance, and other sums stated in the lease agreement. Under this construction of the apparently conflicting provisions, the lease would have a maximum duration of three (3) years, renewable each year after joint review and agreement.

28. Paragraph 32 provides that a successful party to any litigation initiated by landlord or tenant during the term of this lease is entitled to reimbursement for reasonable expenses for such action, including attorney's fees not to exceed $2,500.00.

29. All of the parties submitted request for attorney's fees and submitted Affidavits in support thereof.

From the foregoing Findings of Fact the court now enters its Conclusions of Law as follows:

CONCLUSIONS OF LAW

1. Notwithstanding the apparent conflict between the verbiage contained in paragraph 2 and paragraph 9 of the lease agreement, the Court, as trier of the facts, is obligated to determine the intent of the parties by the language of the document if such intent can be determined without reliance upon parol evidence.

2. The Court, as trier of the facts, is further obligated to construe all of the provisions of the lease agreement in a manner that would be consistent and in harmony with all other

provisions, if such construction is possible.

3. In light of the specific language utilized in the lease agreement and particularly the combined verbiage of paragraph 2, page 1, and paragraph 9, page 6, there exists an apparent ambiguity as to the intent of the parties pertaining to the duration of the lease agreement and pertaining to the landlord and tenant's obligation to review the contract annually for renewal.

4. Such ambiguity not only permits, but requires, the Court permit parol evidence to clarify such ambiguity.

5. Based upon the verbiage of the lease agreement and the parol evidence most consistent with the specific verbiage of the inserted sentence, the Court concludes that Plaintiff was obligated to meet with the Defendants to review the provisions of the contract and particularly the provisions pertaining to the sums to be paid as rental, common area maintenance costs, and other costs on an annual basis to determine whether the Defendants would continue the lease for an additional year and to determine the provisions under which the next year's tenancy would be governed.

6. In light of Mr. Ludlow's testimony that he refused to review the lease provisions with the Defendants and refused to negotiate the provisions of the lease for the forthcoming year, the Court concludes that the Plaintiff breached the terms of the lease and, particularly, the inserted provision of paragraph 9, page 6.

7. Because the Plaintiff breached the provisions of the lease agreement, the Defendants were excused from further performance of the contract.

8. The Court concludes that the attorney's fees provision of paragraph 32, page 15, of the lease agreement does not permit the award of attorney's fees to the Defendants because the attorney's fees recited in paragraph 32 permits the recovery of attorney's fees only if the action or proceeding is instituted during the term of the lease.

9. Since the Defendants have prevailed in this action and the Court has found that the Defendants were excused from performance of the lease after May 1, 1988, and because the Plaintiff's complaint was not filed until after the lease agreement had been terminated, the Defendants are not entitled to attorney's fees under the provision of the lease agreement.

10. The Defendants are entitled, however, to attorney's fees under Section 78-27-56.5, Utah Code Annotated, 1953, as amended, which provides for a reciprocal right of a party to recover attorney's fees if one party to the contract is entitled to attorney's fees under the provisions of the contract.

11. Under that statutory provision, Defendants are entitled to reasonable attorney's fees and the Court concludes that $2,500.00 attorney's fees to be divided among seven (7) Defendants is reasonable and was necessarily incurred to defend this action

for the services outlined in Defendants' Affidavit for Attorney's Fees.

12-10-91

FRANK G. NOEL
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing Findings of Fact and Conclusions of Law, postage prepaid, to:

Randy S. Ludlow, Esq.
Attorney for Plaintiff
311 S. State, Suite 280
Salt Lake City, Utah 84111

John Burton Anderson, Esq., and
Kevin V. Olson, Esq.
Anderson & Dunn
Attorney for Defendants Thomas W. Ostler,
Neil W. Ostler and John A. Vandermyde
2089 East 7000 South, Suite 200
Salt Lake City, Utah 84121

this 29th day of November, 1991.

D7RSL.21A

EXHIBIT I

KENNETH M. HISATAKE #1505
Attorney for Defendants Lee Ostler, Paul Ostler, Christensen, and Custom Design Label Manufacturing
1825 South Seventh East
Salt Lake City, Utah 84105
Telephone: (801) 486-3541

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROY S. LUDLOW INVESTMENT COMPANY,	JUDGMENT
Plaintiff,	217678
vs.	12-18-91-8:15am
THOMAS W. OSTLER, NEIL W. OSTLER, LEE H. OSTLER, PAUL F. OSTLER, JOHN A. VANDERMYDE, DELBERT CHRISTENSEN, individually and all doing business as DESIGN LABEL MANUFACTURING,	Civil No. 890903593CV (Judge Frank G. Noel)
Defendants.	

THIS MATTER came before the Court for trial, as scheduled, on the 14th day of November, 1991, at the hour of 10:00 o'clock A.M. before Judge Frank G. Noel, District Court Judge, sitting without a jury. The Plaintiff was represented by Randy S. Ludlow. The Defendants, Custom Design Label Manufacturing, Paul F. Ostler, Lee H. Ostler, and Delbert Christensen were represented by Kenneth M. Hisatake. The Defendants, Thomas W. Ostler, Neil W. Ostler, and John A. Vandermyde, were represented by John B. Anderson.

Prior to the presentation of testimony and submission of evidence, Plaintiff moved for the default of the Defendant, John A. Vandermyde, for failing to submit a formal answer to Plaintiff's complaint. The Defendant Vandermyde acknowledged that no formal answer was submitted by him in response to Plaintiff's complaint. However, the Defendant Vandermyde had actively defended against Plaintiff's complaint and submitted Answers to Interrogatories and responded to Request for Admissions and had been represented throughout the development of the case by John B. Anderson. The Plaintiff had not moved for default nor requested the entry of default prior to this date. Counsel for Plaintiff stated the reason for the belated motion for default was that he was not aware of Defendant Vandermyde's failure to answer until the evening prior to the trial. The Court denied Plaintiff Motion for Default and granted Defendant Vandermyde's Motion to Adopt as his answer to Plaintiff's complaint, answers which had been submitted by the other Defendants.

Roy S. Ludlow, President of Ludlow Investment Company, appeared and testified in behalf of the Plaintiff. Bruce Richard McMullin was called by the Plaintiff as witness to testify in Plaintiff's behalf. Defendants, Delbert Christensen, Paul Ostler, Thomas Ostler, and Neil Ostler, testified in behalf of the Defendants.

The Court, having heard the testimony of the parties and their witnesses and having reviewed the evidence submitted by the

parties and the Court having made its Findings of Fact and having entered its Conclusions of Law, now enters Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Defendants, and each of them, are granted Judgment against the Plaintiff, no cause of action.

2. The Defendants, cumulatively, are granted Judgment against the Plaintiff for attorney's fees for a total of $2,500.00 to be divided among the seven (7) Defendants equally.

DATED this 10 day of Dec November, 1991.

FRANK G. NOEL
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing Judgment, postage prepaid, to:

Randy S. Ludlow, Esq.
Attorney for Plaintiff
311 S. State, Suite 280
Salt Lake City, Utah 84111

John Burton Anderson, Esq., and
Kevin V. Olson, Esq.
Anderson & Dunn
Attorney for Defendants Thomas W. Ostler,
Neil W. Ostler and John A. Vandermyde
2089 East 7000 South, Suite 200
Salt Lake City, Utah 84121

this 27th day of November, 1991.

D7RSL.26A